FILE COPY

Nos. 23, 24, 34.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

FEDERAL TRADE COMMISSION, PETITIONER,

*v.*

THE CEMENT INSTITUTE, *et al.*

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.*

## MOTION OF GENERAL ELECTRIC COMPANY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE*.

CAHILL, GORDON, ZACHRY & REINDEL
By THURLOW M. GORDON,
63 Wall Street,
New York 5, N. Y.
*Attorneys for General Electric Company.*

RAY H. LUEBBE,
NEIL C. HEAD,
ROBERT M. BOZEMAN,
*Of Counsel.*

October 9, 1947.

# INDEX.


| | PAGE |
|---|---|
| MOTION FOR LEAVE TO FILE BRIEF AS *Amicus Curiae*.... | 1 |
| BRIEF ..... | 3 |
| PRELIMINARY STATEMENT..... | 3 |
| Is it unlawful for a manufacturer, acting individually and without collusion, to sell in markets which are freight-wise nearer the factories of competing companies—and to meet competition in good faith by offering its goods in those markets at the prices there prevailing? | 3 |
| The effect of the orders in the new *Cement* case and the *Rigid Conduit* case upon individual freight absorption ..... | 5 |
| The provisos and qualifications attached to the Commission's disavowals as to the effect of its order on individual freight absorption make it clear that the right of individual freight absorption would be illusory and a mere pretense | 7 |
| THE BACKGROUND ..... | 13 |
| The Commission's attempt to change the law by legislation ..... | 13 |
| The Commission's attempt to change the law by "interpretation" ..... | 14 |
| The Commission directly attacks individual freight absorption ..... | 17 |
| OUTLINE OF ARGUMENT..... | 20 |
| THE ARGUMENT ..... | 24 |
| I. *Individual freight absorption to meet competition is a normal, natural and usual method of doing business. It has never been considered immoral or unfair* ..... | 24 |
| It is not unlawful *per se* | 24 |

PAGE

The Commission nullifies the right to meet competition—which is expressly recognized by the Robinson-Patman Act ..... 29

Congress clearly intended to protect honest freight absorption to meet competition ..... 30

What constitutes good faith is a question of law 32

Good faith requirement—satisfied by honestly meeting a price lawfully established by a nearer mill ..... 33

No "discrimination" here ..... 35

Freight absorption to meet lawful competition makes "due" allowance for differences in the cost of transportation ..... 36

No lessening of competition and no injury to competitors ..... 38

The Commission's interpretation of the law would result in Balkanizing the United States 40

The Commission's order would have precisely the same effect as an agreement among businessmen to divide territory ..... 41

The effect would be to decrease competition—not to increase it ..... 41

Rigidity of prices would be increased ..... 42

Prices would not decrease. On the contrary, they would probably increase ..... 43

Widespread and destructive dislocation of existing capital investment ..... 43

Injury to buyers ..... 46

The buyers themselves desire delivered prices .... 46

No loss of advantages of location ..... 47

Formula pricing not eliminated ..... 49

Imported goods would drive American products from the seaboard ..... 51

The Commission's theory would impede exports 52

PAGE

II. *Such revolutionary changes in our national economy should be made, if at all, by Congress, and not by Judicial Legislation* ..... 52

Revolution—not interpretation ..... 52

III. *The Commission is asking this Court to do by Judicial Legislation what Congress has repeatedly refused to do* ..... 54

The Clayton Act in 1914 ..... 55

The Wheeler Bill in 1936 ..... 55

Robinson-Patman Act Proceedings in 1936 ..... 56

TNEC Hearings in 1940 ..... 57

IV. *Past agreements cannot justify prohibition of future individual freight absorption* ..... 60

It cannot be prohibited as a penalty ..... 60

Individual freight absorption cannot be prohibited under any theory that a continuance of past agreements should be inferred from acts which are normal, inescapable, and lawful *per se* ..... 62

V. *Under the Commission's theory there would be no practical way of complying with its order except by abandoning individual freight absorption* ..... 64

1. The argument that freight absorption is inherently collusive ..... 67

2. The argument that similar independent action —with knowledge—is the same thing as agreement ..... 67

3. The argument that agreement will be presumed from uniformity of price. The descending spiral theory of competition ..... 69

(a) Substantial uniformity would exist under any pricing system ..... 70

PAGE

(b) Uniformity not the result of the basing-point system ..... 70

(c) Descending spiral theory of competition.... 73

(d) The Robinson-Patman Act exempts *meeting* prices—not *undercutting* prices..... 74

(e) Uniformity of price recognized as normal 75

4. The argument that "reciprocal invitations" amount to "agreement"..... 76

VI. *This Court is not bound by the Commission's action with respect to*

1. Construction of the law..... 78

2. The inferences to be drawn from the testimony of experts..... 78

3. Findings which are incredible or not supported by substantial evidence..... 78

CONCLUSION ..... 81

# TABLE OF AUTHORITIES

## Cases


| | PAGE |
|---|---|
| *Cement Manufacturers Protective Ass'n* v. *United States*, 268 U. S. 588 (1925) | 26, 27, 49, 69, 70, 72, 73, 75 |
| *Corn Products Refining Co., et al.* v. *Federal Trade Commission*, 324 U. S. 726 (1945) | 27, 58, 67 |
| *Dunshee* v. *Standard Oil Co.*, 152 Iowa 618, 132 N. W. 371 (1911) | 55 |
| *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (C. C. A. 7th 1944), *cert. denied*, 323 U. S. 730 (1944) | 16, 28 |
| *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1 (1927) | 26 |
| *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568 (1923) | 79 |
| *Federal Trade Commission* v. *Gratz, et al.*, 253 U. S. 421 (1920) | 78 |
| *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 304 (1934) | 79 |
| *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643 (1931) | 79 |
| *Federal Trade Commission* v. *A. E. Staley Manufacturing Co., et al.*, 324 U. S. 746 (1945) | 27, 33, 35, 68 |
| *Fort Howard Paper Co., et al.* v. *Federal Trade Commission*, 156 F. 2d 899 (C. C. A. 7th 1946), *cert. denied*, 329 U. S. 795 (1946) | 16 |
| *General Electric Company et al.* v. *Federal Trade Commission*, Case No. 8644 | 4 |
| *Hartford-Empire Co., et al.* v. *United States*, 323 U. S. 386 (1945) | 61 |
| *Hofeller* v. *Federal Trade Commission*, 82 F. 2d 617 (C. C. A. 7th 1936), *cert. denied*, 299 U. S. 557 (1936) | 79 |

PAGE

*Interstate Commerce Commission* v. *Louisville and Nashville Railroad Co.*, 190 U. S. 273 (1903) ..... 38

*Interstate Commerce Commission* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108 (1908) ..... 38

*Milk and Ice Cream Can Institute, et al.* v. *Federal Trade Commission*, 152 F. 2d 478 (C. C. A. 7th 1946) ..... 15, 28

*Morton Salt Co.* v. *Federal Trade Commission*, (C. C. A. 7th May 27, 1947) CCH TRADE REG. SERV. Par. 57,569 ..... 35, 38, 74

*New Automobiles in Interstate Commerce*, 259 I. C. C. 475 (1945) ..... 38

*Peoria Gas and Electric Company* v. *Peoria*, 200 U. S. 48 (1906) ..... 61

*Rigid Steel Conduit Ass'n, et al., Matter of*, 38 F. T. C. 534 (1944) 3 CCH TRADE REG. SERV. Par. 12,839 ..... 4, 18, 25, 31, 36, 49, 62, 70, 73, 77

*Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 148 F. 2d 378 (C. C. A. 2d 1945), *cert. denied*, 326 U. S. 734 (1945); 155 F. 2d 1016 (C. C. A. 2d 1946) 68, 74

*Salt Producers Ass'n, et al.* v. *Federal Trade Commission*, 134 F. 2d 354 (C. C. A. 7th 1943) ..... 14, 28, 61, 69

*State* v. *Standard Oil Co.*, 111 Minn. 85, 126 N. W. 527 (1910) ..... 55

*State* v. *Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902 (1909) ..... 55

*Texas and Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 197 (1896) ..... 37

*Texas and Pacific Railway Co., et al.* v. *United States*, 289 U. S. 627 (1933) ..... 37

PAGE

*United States* v. *American Potash and Chemical Corp., et al.* (Crim. No. 105-184, S. D. N. Y. 1939) 3 CCH TRADE REG. SERV. 8th Ed. Par. 15,086 ..... 45, 51

*United States* v. *American Potash and Chemical Corp., et al.* (Civ. No. 8-498, S. D. N. Y. 1939) 3 CCH TRADE REG. SERV. 8th Ed. Par. 25,461 ..... 45, 51

*United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499 (1935) ..... 38

*United States* v. *Cooper Corporation*, 312 U. S. 600 (1941) ..... 60

*United States* v. *Great Western Sugar Co., et al.*, 39 F. 2d 152 (D. Neb. 1930) ..... 51

*United States* v. *International Harvester Company, et al.*, 274 U. S. 693 (1927) ..... 75

*United States* v. *Illinois Central Railroad Company, et al.*, 263 U. S. 515 (1924) ..... 38

*United States* v. *Standard Oil Co. of New Jersey*, 47 F. 2d 288 (E. D. Mo. 1931) ..... 75

*United States Maltsters Ass'n, et al.* v. *Federal Trade Commission*, 152 F. 2d 161 (C. C. A. 7th 1945) ..... 16, 28

STATUTES

PAGE

Administrative Procedure Act, 60 STAT. 237, 5 U. S. C. A. §§1001-1011 (Supp. 1946) ..... 79

Clayton Act, §2, 38 STAT. 730 (1914), as amended by the Robinson-Patman Act, 49 STAT. 1526 (1936), 15 U. S. C. §13 (1940) ..... 8, 9, 10, 12, 14, 18, 21, 29, 30, 31, 36, 38, 39, 53, 54, 55, 56, 74

Clayton Act, Original §2, 38 STAT. 730 (1940) ..... 30, 37, 53, 54, 55, 57

Federal Trade Commission Act

§5, 38 STAT. 719 (1914), 15 U. S. C. §45 (1940) ..... 23, 29, 52, 53, 54, 60

Interstate Commerce Act, §3(1), 24 STAT. 380 (1887), 49 U. S. C. §3(1) (1940) ..... 37

PAGE

MISCELLANEOUS CITATIONS

*Administrative Procedure Act, Legislative History*, SEN. DOC. No. 248, 79th Cong., 2d Sess. (1946) ..... 80

80 CONG. REC. (1936) 6426, 6435, 6436, 7760, 8122, 8126-7, 8130, 8223-4, 8226, 9903-4 ..... 56, 57

FTC ANN. REP. (1944) ..... 58

FTC ANN. REP. (1945) ..... 58

*Hearings before Committee on Interstate Commerce on S.* 4055, 74th Cong., 2d Sess. (1936) ..... 56

*Hearings before TNEC* (1940) Part 27, pp. 14,329, 14,548 ..... 57, 58

H. R. REP. No. 627, 63rd Cong., 2d Sess. (1914) ..... 55

H. R. REP. No. 2287, 74th Cong., 2d Sess. (1936) ..... 31, 57

H. R. REP. No. 1980, 79th Cong., 2d Sess. (1946) ..... 80

Patman Bill, as introduced, H. R. 8442, 74th Cong., 2d Sess. (1936) ..... 31, 57

Robinson Bill, as introduced, S. 3154, 74th Cong., 2d Sess. (1936) ..... 57

*An Analysis of the Basing Point System and Delivered Prices as presented by United States Steel Corporation in "Exhibits No. 1410 and 1418"*, Exhibit No. 2242, *Hearings before TNEC* (1940) Part 27, p. 14,548, reprinted in TNEC MONOGRAPH No. 42 (1941), pp. 91-140 ..... 57

TNEC MONOGRAPH No. 42 (1941) ..... 57

TNEC FINAL REPORT (1941) ..... 58

Wheeler Anti-Basing-Point Bill, S. 4055, 74th Cong., 2d Sess. (1936) ..... 11, 55, 56

Nos. 23, 24, 34.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

---

FEDERAL TRADE COMMISSION, PETITIONER,

*v.*

THE CEMENT INSTITUTE, *et al.*

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.*

---

## Motion for Leave to File Brief as *Amicus Curiae.*

MAY IT PLEASE THE COURT, the undersigned, as counsel for General Electric Company, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

General Electric Company is a party to a proceeding now pending before the Circuit Court of Appeals of the United States for the Seventh Circuit involving another order of the Federal Trade Commission which presents issues of law similar in certain respects to those presented here.

That proceeding involves an order of the Federal Trade Commission against General Electric Company and other manufacturers of rigid conduit which specifically and unequivocally forbids the General Electric Company in the regular course of business to meet competition in ter-

ritory freight-wise nearer a competing mill—even though acting individually and without collusion.

The Federal Trade Commission moved to postpone all further proceedings in the above mentioned conduit case before the Circuit Court of Appeals until after final decision of this Court in the present case. That motion was denied—but the time for filing the Commission's answering brief was postponed until November 1, 1947.

Consequently, the General Electric Company may have this vital issue decided against it—or seriously affected—without having any opportunity to be heard—unless it is heard as *amicus curiae* here.

Written consent of all parties to this appeal has been obtained.

CAHILL, GORDON, ZACHRY & REINDEL,

By THURLOW M. GORDON,
a Member of the Firm,
Attorneys for General Electric Company.

RAY H. LUEBBE,
NEIL C. HEAD,
ROBERT M. BOZEMAN,
Of Counsel.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947.

---

FEDERAL TRADE COMMISSION, PETITIONER,

*v.*

THE CEMENT INSTITUTE, *et al.*

---

## BRIEF FOR GENERAL ELECTRIC COMPANY.

### Preliminary Statement.

This brief of the General Electric Company (hereinafter called General Electric) is directed to a single issue, namely:

> **"Is it unlawful for a manufacturer, acting individually and without collusion, to sell in markets which are freight-wise nearer the factories of competing companies—and to meet competition in good faith by offering its goods in those markets at the prices there prevailing?"**

That issue is a pure question of law and will be argued as such. The basic facts on which that issue depends are simple. They lie within the field of common knowledge.

The legal conclusion to be drawn from these undisputed facts is the ultimate issue to be decided by this Court.

As stated in the accompanying motion, General Electric desires to file this brief because of the serious effect which

the decision of this Court in the present case (hereinafter called the new *Cement* case) may have upon an analogous proceeding to which General Electric is a party involving the sale of rigid conduit. That case—hereinafter called the *Rigid Conduit* case—is now pending before the Circuit Court of Appeals for the Seventh Circuit in Chicago.*

The order of the Federal Trade Commission which is involved in the *Rigid Conduit* case specifically provided that General Electric cannot absorb freight to meet competition in markets where it is freight-wise at a disadvantage. The order forbids General Electric doing so—even though it acts individually and wholly without collusion with competitors.

In effect, it requires General Electric to retire from those markets in which it is freight-wise at a disadvantage —and to sell f.o.b. its own mill upon a basis which will give the same mill-net on all sales, without regard to the varying market conditions in the communities where the goods are actually sold and delivered.

That means that General Electric must retire from doing a national business—and confine its sales to the limited area which is not freight-wise nearer a competing mill.

This question is not one which depends upon anything peculiar to the cement industry or to the rigid conduit industry. If the Commission is upheld, the principle is one of wide application and will apply to practically every industry in which freight is an appreciable factor.

---

* *General Electric Company et al.* v. *Federal Trade Commission*, Case No. 8644, United States Circuit Court of Appeals for the Seventh Circuit. The order of the Commission which is appealed from in that case may be found in *Matter of Rigid Steel Conduit Ass'n, et al.*, 38 F. T. C. 534 (1944); and in 3 CCH TRADE REG. SERV. Par. 12,839.

For example, the plant where General Electric chiefly produces heavy electrical equipment—such as dynamos and electric motors, is at Schenectady, New York. The Westinghouse Electric and Manufacturing Company, one of its competitors, has its principal plant at Pittsburgh, Pennsylvania.

If the Commission is correct in the interpretation of the law embodied in these orders, a freight wall will be erected roughly half-way between Schenectady and Pittsburgh. General Electric will be unable to sell south and west of that wall. Westinghouse will be unable to sell north and east of that wall. General Electric will have to retire from selling at cities such as Cleveland and Cincinnati. Westinghouse will have to retire from selling in New York City.

General Electric does not wish to retire from the markets in which it is now selling. It does not wish to cease doing business upon a national basis and to become a mere local company doing business within a local territory surrounded by a freight tariff wall erected by the order of the Commission.

This is what these cases are about.

**The effect of the orders in the new *Cement* case and the *Rigid Conduit* case upon individual freight absorption.**

The order of the Commission in the new *Cement* case was prefaced by words seeming to confine its operation to cases where freight absorption was the result of conspiracy.

However, in its brief and argument below, the Commission took the position that the order would in effect prevent even non-collusive freight absorption.

It boldly took the position that freight absorption is "inherently collusive," i. e., that it is illegal *per se*, regardless of collusion.

The Circuit Court of Appeals clearly understood that this was the contention of the Commission and so found (157 F. 2d at pp. 542-543, 573).

The Commission now takes the position that its contentions in the new *Cement* case were misinterpreted by the court below. There is no question, however, as to the real purpose of the Commission. Its real purpose has been indicated repeatedly by its public statements, by its attitude in recent cases, by its brief in this case, and very clearly in its order in the *Rigid Conduit* case.

The orders in the new *Cement* case and in the *Rigid Conduit* case were the culmination of a campaign by the Commission extending over a number of years for the deliberate purpose of finally and completely outlawing freight absorption—even though done individually and without collusion.

The Commission's complaint in the *Rigid Conduit* case contained two counts—Count I directed against collusive action—Count II directed against individual action.

Correspondingly, the Commission's order in the *Rigid Conduit* case contained two groups of prohibitions. One group as in the new *Cement* case was directed specifically against *collusive* action. The other group—corresponding to Count II of the complaint—was specifically directed against *individual* action.

Thus, in the *Rigid Conduit* case, the Commission took the very position which it now disavows in the new *Cement* case.

Moreover, its disavowal here in the new *Cement* case is so qualified that it is perfectly clear that this disavowal is a purely technical one.

While it contends that *this particular order*—the order in the new *Cement* case—is directed only to collusive action, that disavowal is accompanied by limitations and quali-

fications which make it perfectly plain that it has not abandoned its real purpose. It would be impossible for any business man to comply in practice with those qualifications and limitations.

The Commission would conclusively presume collusion from those honest acts of competition which are the irreducible minima of doing business at all.

Disavowals so qualified merely make it doubly clear that despite these disavowals the Commission will interpret even the order in the new *Cement* case in such a manner that it will achieve by indirection the same thing that it has directly sought to do in the *Rigid Conduit* case.

**The provisos and qualifications attached to the Commission's disavowals as to the effect of its order on individual freight absorption make it clear that the right of individual freight absorption would be illusory and a mere pretense.**

The Commission nowhere makes any forthright and direct concession that independent individual freight absorption in the regular course of business, is lawful. It does not even give lip service to the principle of individual freight absorption.

On the contrary, it merely says that the *order* in the new *Cement* case (unlike the order in the *Rigid Conduit* case) does not in terms apply to individual action.

But the accompanying provisos and qualifications suck all meaning out of this ostensible disavowal. The Commission—even under the new *Cement* order—does not seek to prohibit merely the abuses, if any, of freight absorption.

It intends to prohibit even honest, bona fide freight absorption.

It intends to prohibit freight absorption itself—and to outlaw it as illegal *per se*.

The provisos and qualifications are merely camouflaged ways of saying that collusion will be presumed from

freight absorption—that freight absorption is "inherently collusive".

The following examples show how hollow this disavowal really is:

1. *The argument of the Commission under the Robinson-Patman Act* is not based upon the existence of collusion*** (C. Br.*** 104, 112). The Commission says explicitly (C. Br. 114):

> "*Even in the absence of such combination,* the section [Section 2 (b) of the Clayton Act] does not validate the respondents' discriminatory prices."****

The Commission found in the new *Cement* case that:

> "the systematic discriminations in mill nets by each respondent seller among its various customers which necessarily result from the use of the multiple basing-point delivered-price system are discriminations in price that are unlawful under subsection (a) of Section 2 of the Clayton Act as amended;" (Par. 25, R. 16, 130-31).

2. *The Commission argues that collusion may be inferred from the mere fact of selling regularly in a freight-disadvantage market and absorbing freight to meet the prices there prevailing.* It says (C. Br. 123):

> "We think that under the facts of this case an inference of agreement could reasonably be drawn from the existence of the system alone."

---

* Clayton Act, §2, 38 STAT. 730 (1914), as amended by the Robinson-Patman Act, 49 STAT. 1526 (1936), 15 U. S. C. §13 (1940).

** The Commission's brief, page 104, summarizes its argument in the following heading:

> "A. Each Respondent Discriminated in Price within the Meaning of Section 2 (a) when it Sold Cement at Delivered Prices Yielding a Greater Net Return in Some Localities than in Others"

*** The brief of the Commission will be referred to herein as "C. Br."

**** Italics in quotations throughout are ours unless otherwise specified.

This is merely another way of saying—as the Commission said below—that selling on a freight-absorption-meet-competition basis is *"inherently collusive"*.

3. *The Commission argues, in effect, that collusion would be inferred from similarity of price—in the same market.*

The Commission says (C. Br. 122) that under this collusion order individual freight absorption would be possible to an individual seller—

> "provided he acts • • • with that variability in action respecting particular competitive situations which is characteristic of genuine competitive endeavor • • •".

This means, in effect, that two sellers cannot sell identical goods at the same price in the same market.

This means that a seller at a freight disadvantage may not invade—or continue to sell in—"territory naturally tributary" to another competitor (to use the Commission's phrase) by meeting the local competitor's price.

On the other hand, if he should cut below the local competitor's price, then under the Commission's theory as expressed in other cases, he would violate the Robinson-Patman Act. See pages 68, 74, 75 *infra* for a discussion of these cases.

4. *The Commission says* (C. Br. 126) *that there may be "temporary conditions" under which individual freight absorption would no. be prohibited by this order—*

> "provided that it does not result in prohibited price discriminations."

But the Commission takes the view in the same brief that individual freight absorption—even for the purpose of honestly meeting competition—*does* result in

illegal price discrimination because it results in varying mill-nets.

The Commission doggedly clings to the position that the "*true price*" is the "*mill-net*"—the price after deducting freight—and that since the mill-nets vary where freight absorption occurs, this results in discrimination within the meaning of the Robinson-Patman Act (C. Br. 8, 24, 34, 104).

The Commission does this despite the fact that this same "mill-net" definition of price was originally inserted in the Robinson-Patman Bill, under the Commission's sponsorship, for the very purpose for which the Commission is using it here—namely, to render freight absorption illegal *per se*. This "mill-net" definition of price was deliberately and consciously stricken out of the Act. The committee in charge of the bill stated in its report that otherwise the bill could not be passed.

5. *The Commission would infer the "continuance" of past agreements from continuing to sell on a meet-competition-freight-absorption basis.*

The order in the new *Cement* case, as in the *Rigid Conduit* case, prohibits the respondents from "continuing * * * any planned common course of action." The Commission's brief argues that if ever there has been any agreement with respect to freight absorption, such an agreement "is self-perpetuating" and that "renewed understandings or agreements" are not necessary. (C. Br. 19, 66.)

It is quite clear therefore that if any of the defendants were to continue to absorb freight in order to sell in distant markets, the Commission would charge that such selling is in continuance of some prior agreement—i. e., is in continuance of a common course of action that once was planned.

6. *The Commission would infer violation of the order from the existence of cross-hauling.*

The Commission argues (C. Br. 127) that cross-hauling—

> "occurs only fortuitously and sporadically under normal competitive conditions and that its existence indicates absence of a free competitive market".*

This is a most extraordinary statement.

Cross-hauling is a practice that is universal in the business world. It is difficult to conceive how the Commission could have reached a conclusion so diametrically opposed to common knowledge.

If the Court gives the slightest support to this preposterous contention, the Commission will hereafter certainly take the position that it may conclusively infer the existence of collusion from the existence of cross-hauling. This means that no one can safely sell outside his freight-advantage territory.

7. *The Commission denies* (C. Br. 124) *that the effect of its Cement order would be to*

"preclude *all* freight absorption".

What it means is that it would only preclude "systematic" freight absorption. That means absorbing freight—not upon a hit-and-run basis—but regularly, in the ordinary course of business. The Commission concedes (C. Br. 124, 125):

> "We do anticipate that the order will preclude mutual and common use of any pricing formula in which, as at present, freight absorption is *systematic*,

* The Commission urged these same views before Congress in 1936, in supporting the so-called Wheeler Anti-Basing-Point Bill (S. 4055, 74th Cong., 2d Sess. 1936). The avowed purpose of that bill was to prohibit cross-hauling in accordance with the Commission's views. Extensive hearings were held—but Congress did not accept the views urged by the Commission. This is discussed at greater length, *infra*, pp. 55, 56.

frequently flagrant (in relation to sales price), and mutually practiced by all concerned."

That means that if sellers regularly absorb freight in order to sell outside their own freight advantage territory, they would violate the order. Their only practical alternative would be to withdraw from competition outside their own freight-advantage territory.

---

These same theories were embodied in the Findings and Order of the Commission in the *Rigid Conduit* case. They are discussed at length hereinafter because General Electric well realizes that even if that portion of the *Rigid Conduit* order which was directly aimed at individual freight absorption were abandoned, the Commission would still accomplish the same result indirectly under the collusion portion of the order—because of its avowed theories as to what would constitute collusion and what constitutes violation of the Robinson-Patman Act.

If these theories are accepted, they will end the flexible interpenetration of markets which freight absorption alone makes possible.

---

This is a matter of enormous importance not only to General Electric but also to industry generally. It would be most unfortunate if this Court—by reason of any misunderstanding as to the real position of the Commission—should render a decision in the new *Cement* case which would either—.

(1) hold that the Commission can prohibit individual freight absorption, or

(2) restrict the order in the new *Cement* case to collusive action but sustain it upon such grounds that the right of individual freight absorption would be illusory—hollow—and a mere pretense.

## THE BACKGROUND

Some years ago the Commission became a devotee of an economic theory advanced by Professor Fetter*—but, so far as we are aware, not generally accepted by other economists and unanimously rejected by businessmen, whether buyers or sellers.

Since then, the Commission has been conducting a creepingly progressive campaign against the system of distribution which prevails—and always has prevailed—in many industries. It has sought—at first by proposals for new legislation which were rejected, and more recently by the "interpretation" of existing law—to prohibit the historic practice of selling at delivered prices and absorbing freight to meet competition in markets freight-wise nearer a competing mill.

### The Commission's attempt to change the law by legislation.**

The initial approach of the Commission was extremely tentative. It did not at first take the position that this method of selling was unlawful *per se*. It apparently accepted the view that freight absorption was not prohibited by existing law, but sought to have the law changed.

An example of this approach on the part of the Commission may be found in the testimony given by the Commission at the hearing on the bill offered in 1936 by Senator Wheeler "To Prevent Unnecessary and Wasteful Cross-Hauling". The Commission appeared by witnesses and submitted a written statement, and actively urged the passage of the bill.

This bill was dropped by the sponsor of the bill himself, after extensive hearings which developed its unwisdom and impracticability.

---

* Dr. Frank A. Fetter, then Professor of Political Economy, Princeton University.

** A more detailed discussion of the Commission's various attempts to change the law by legislation is set forth *infra* at pp. 54-60.

Again, during the hearings on the Robinson-Patman Act in 1936, the Commission appeared in support of the provision—originally contained in the Robinson-Patman Act—which would have compelled sellers to abandon freight absorption. It is sufficient at this point to state that this provision was expressly rejected by Congress. It was stricken out on the statement of the sponsors of the bill that great opposition had developed and that the bill could not be passed if this provision remained.

The Commission did not at that time take the position that the meeting of competition by selling at the price prevailing in a market which freight-wise is nearer a competing mill was unlawful *per se*—under the Federal Trade Commission Act or otherwise. It assumed that this historic method of selling was lawful, and urged that the law in this respect be modified.

In the hearings before the TNEC in 1940 the Commission took a similar position, urging that the law be modified—but not claiming, as it now does, that it could stretch the existing law to cover the practice and that no such modification was necessary.

Pursuant to the Commission's request, the TNEC made recommendations that the law be changed in this respect.

But these recommendations were not favorably received and have never been acted upon by Congress.

**The Commission's attempt to change the law by "interpretation."**

Failing in its attempts to secure new legislation, the Commission first brought a series of cases based upon the theory that it was illegal for sellers to enter into *agreements* to use any delivered-price method of selling as part of a combination to fix prices.

Thus, in *Salt Producers Ass'n, et al.* v. *Federal Trade Commission*, 134 F. 2d 354 (C. C. A. 7th 1943), the Commission, having found the existence of such an agreement, prohibited the future use of that method in terms which were broad enough to prohibit such use even when done individually. On appeal, the respondents in that case urged that the

order be modified so as to indicate clearly that it did not forbid individual action. The Commission disclaimed any such intent, saying (as quoted by the court, p. 357):

> " 'Needless to say the Commission has no thought that it can or should interfere with the independent or competitive determination of prices or production policy by the petitioners and the order is not fairly susceptible of such interpretation. The legal and economic concept of price fixing automatically excludes independent action. Petitioners assume without warrant for purposes of their argument that the legal and economic concept may include it. *The idea that petitioners might be proceeded against for violation of the order because of such independent competitive determination is grotesque* and would hardly occur to any one who in good faith acts independently and competitively.' "

The court held (p. 360):

> "It is, however, of the utmost importance that the petitioners know exactly what they are prohibited from doing * * *."

And accordingly amended the order (p. 357)—

> "by adding the word 'planned' before the phrase 'common course of action' so that only illegal *contractual* arrangements will be subject to contempt proceedings." (Court's italics.)

Thereafter this issue came before the same court in *Milk and Ice Cream Can Institute, et al.* v. *Federal Trade Commission*, 152 F. 2d 478 (C. C.A. 7th 1946). The Commission's order in that case contained the words "planned common course of action." On appeal, the respondents there asked that a proviso be inserted unequivocally stating that nothing in the order should apply to action taken individually and not by agreement. The Commission again opposed this, on the ground that such a proviso was unnecessary, and conceded that the order would not apply to individual action.

On the basis of that concession, the court held an express proviso unnecessary, saying (p. 483):

"It will be noted that each of the prohibited acts is directed solely at price fixing in connection with an agreement or conspiracy. * * * The Commission in its brief concedes what we think is obvious: 'It is wholly unnecessary that the order be amended so as to expressly reserve to petitioners their rights of independent action. They have those rights regardless of the order and those rights would not be changed or protected in the least by adding such a proviso. * * * *The Commission knows as well as petitioners that no violation of the order in its present form can be established by any showing of independent action.*'"

The same formula, limiting the order to a "planned common course of action," was utilized by the Commission in four other cases which came before the same court—namely,

*Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (C. C. A. 7th 1944), *cert. denied*, 323 U. S. 730 (1944);

*United States Maltsters Ass'n, et al.* v. *Federal Trade Commission*, 152 F. 2d 161 (C. C. A. 7th 1945);

*Fort Howard Paper Co., et al.* v. *Federal Trade Commission*, 156 F. 2d 899 (C. C. A. 7th 1946), *cert. denied*, 329 U. S. 795 (1946);

*Aetna Portland Cement Co., et al.* v. *Federal Trade Commission*, 157 F. 2d 533 (C. C. A. 7th 1946), *cert. granted*, 67 Sup. Ct. 967 (1947) (the new *Cement* case).

In the new *Cement* case, however, the Commission took a distinctly more aggressive forward step. Although the preamble to the order contained the usual formula—"planned common course of action"—nevertheless the Commission in its brief took the position, in no uncertain terms, that it intended to interpret the order to forbid individual action.

It argued in effect:

(1) that the individual use of a delivered-price-meet-competition-freight-absorption method of selling was illegal *per se;*

(2) that it was "*inherently collusive*" and

(3) that the case would have been tried in vain if the court did not support the Commission in that view.

The court below rejected the views of the Commission. This Court should also reject those views.

**The Commission directly attacks individual freight absorption.**

It is important to note, however, that in the *Rigid Conduit* case, the Commission has gone even further than in the new *Cement* case. It has abandoned all pretense of limiting its order to agreement and collusion. The order in the *Rigid Conduit* case contains provisions which are directly and unequivocally aimed at individual action—absent any agreement whatever.

That order is therefore more extreme and even more clearly illegal than the order in the new *Cement* case.

The reasoning on which Judge Evans based his dissenting opinion in the new *Cement* case is not applicable to the order in the *Rigid Conduit* case. Judge Evans in his opinion said (p. 575):

> "The Commission's challenge here lays stress on the *agreement* to utilize a multiple basing point system rather than stressing illegality of the multiple basing point system *per se* and its order is correspondingly limited to 'such asserted illegal *agreement.*" [Italics Judge Evans'.]

There can be no question that the Commission boldly and deliberately intended to make the *Rigid Conduit* case the culminating step in its campaign against individual freight absorption.

The complaint in the *Rigid Conduit* case contained two counts (38 F. T. C. 539-550):

> *Count I* followed generally the pattern of the complaint in the new *Cement* case and charged that the use of the basing-point method of selling was the result of combination, conspiracy, and agreement.

*Count II* went further and charged that, irrespective of combination, the use of the basing-point method of selling by the respondents individually was unlawful.

The Findings as to the Facts and the Conclusions held that the respondents had violated Section 5, the unfair-competition section, of the Federal Trade Commission Act,* under both counts, namely,

(1) by combination;**

(2) by the action of *each* respondent individually.***

The order**** contains two separate paragraphs, corresponding to Counts I and II of the complaint. The paragraph corresponding to Count I was directed against "any planned common course of action, understanding, agreement, combination, or conspiracy".

The paragraph corresponding to Count II is directed against *each of the respondents individually,* and in effect prohibits the use of the basing-point system as *illegal per se.* This paragraph, omitting respondents' names, reads as follows:

> "IT IS FURTHER ORDERED that *each* of the corporate respondents. . . . do forthwith cease and desist from doing any of the following things for the purpose *or with the effect* of systematically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers:
>
> "(a) Quoting or selling rigid steel conduit at prices calculated or determined pursuant to, or in accordance with, the basing-point, delivered-price system.
>
> "(b) Quoting or selling rigid steel conduit at delivered prices calculated as, or systematically

* There were no charges or findings of violation of § 2 of the Clayton Act, as amended by the Robinson-Patman Act.

** Finding 19(a), 38 F. T. C. 592, 593.

*** Finding 19(b), 38 F. T. C. 593.

**** 38 F. T. C. 593-596.

equivalent to the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point.

"(c) Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination.

"(d) Discriminating among purchasers by quoting or selling rigid steel conduit at prices which systematically differ in terms of mill nets according to the location of purchasers, and which mill nets, plus common carrier transportation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchasers from differently located respondents."

This language leaves nothing to the imagination. Its purpose and effect is obviously to declare that even individual freight absorption to meet competition is illegal *per se* and is prohibited under any and all circumstances.

This paragraph forbids broadly every conceivable kind of delivered-price method of selling which does not produce uniform "mill nets". This of course would outlaw individual freight absorption.*

Sub-paragraphs (b) and (c) forbid both freight absorption and phantom freight. Sub-paragraph (d) forbids any method of selling which produces uniform delivered prices but produces mill-nets which vary as between different localities.

The use of the word "systematically" does not constitute any practical limitation. It merely lets out an occasional hit-and-run transaction. But if any seller does business regularly in a freight-disadvantage market, he would undoubtedly be held to be doing so "systematically."

---

* It would also forbid any and all zone methods of selling. It would even forbid selling at a single uniform price—throughout the country—a postage-stamp or "dollar-watch" price—because, although everyone receives the same price, the mill-nets would vary.

The words "matching" delivered price quotations mean merely meeting competition—as the court below held in the new *Cement* case (p. 554).

The following words of the court in the new *Cement* case (p. 542) are clearly applicable to the order in the *Rigid Conduit* case:

> "The order further makes plain that it is the purpose of the Commission to require *each producer to sell cement on an f.o.b. mill price basis.*"

The Commission has taken pains to make it clear that its deliberate purpose in the *Rigid Conduit* case is to do the very thing that it disavowed doing in the earlier cases and which it now disavows in the new *Cement* case.

The Commission took pains to repudiate the very ground on which Judge Evans in his dissenting opinion sought to sustain the new *Cement* order.

## OUTLINE OF ARGUMENT.

The Commission's theory is not based upon facts peculiar to any industry. It is based upon an "interpretation" of the law which is the culmination of a long campaign. Its principle is one of general application—and the Commission makes no secret of the fact that it intends so to apply it.

The issue, therefore, is one of enormous importance—not only to General Electric, but to every other industry in the United States.

Since this is a question of general law, we shall argue it as such.

Moreover, the question being one of law, it is one for the courts to determine, and this Court in so doing is not bound by the Commission's interpretation.

The following is an outline of the argument—which will be more fully developed hereinafter:

I. *Individual freight absorption is not unfair competition or illegal per se.*

> Varying prices to meet lawful competition is not illegal *per se.*

It is a normal, natural and usual method of doing business. It has never been considered immoral or unfair.

The Commission's interpretation denies the right to meet competition which is expressly recognized by the Robinson-Patman Act.

Congress clearly intended to protect honest freight absorption to meet competition.

*"Balkanization."* The Commission's theory would break up the United States from a single national economic unit into a group of little Balkan principalities, each protected by a definite and impassable boundary—a tariff wall created by freight rates.

*Local monopolies.* This Balkanization would not increase competition. It would decrease competition by dividing the country into a series of local monopolies, duopolies or oligopolies.

*In effect a division of territory.* It would have precisely the same effect as an agreement by businessmen to divide territory—each agreeing to keep out of the territory of the others.

*Barrier to free flow of commerce.* It would in effect create a cartel interposing barriers against the free flow of national and international commerce. But this cartel would not result from private agreements among businessmen. It would be imposed upon them by the fiat of the Commission—against the will of the manufacturers and also against the will of their customers.

*Competition decreased—not increased.* Competition would be decreased—not increased—by compelling all but one or a very few sellers to retire from each market.

*Rigidity of prices would be increased.* It would result in a rigidity of price structure far exceeding anything heretofore existing. It would divide the country into territorial compartments, each bounded by a freight rate wall. No seller could invade another's territory except at the cost of lowering prices on his entire output. Such reduction would at most result in pushing back the boundaries of his compartment a few miles. And those boundaries would probably be immediately

restored by corresponding price reductions by competitors. Hence there would be no incentive to make such reductions. The effect would be to create a static condition in which there would be no real incentive to compete.

*Prices would not decrease—on the contrary they would probably increase.* Obviously, if a large proportion of the sellers in each market were compelled to withdraw, there would be less likelihood of price decreases. A multiplicity of sellers keeps prices down and tends constantly to reduce prices through individual price concessions. If all but one—or a few—sellers were excluded from the boundary of any given compartment or area, there is no reason to suppose that prices would be more flexible. On the contrary, they would tend to stabilize or to increase.

*Injury to sellers. Destruction and dislocation of capital investment.* Sellers would be injured by being compelled to withdraw from their existing markets.

*Plants would have to be relocated,* with resulting loss of invested capital. The requirement that sales in different markets be made on such a basis that they produce uniform mill-nets would also subject sellers to insuperable difficulties and complexities where the same seller sells in many markets and delivers from different factories, and also from warehouses and from local assembly plants, and at times by different methods of transportation.

*Injury to buyers.* Buyers would be deprived of the opportunity to choose between a multiplicity of sellers.

It is very important to the buyer to be able to choose between a number of sellers on the basis of price, quality, service, capacity and certainty of delivery, and to have the protection resulting from numerous alternative sources of supply.

*The buyers themselves desire delivered prices.* Buyers almost universally prefer delivered prices because they thereby receive offers which are comparable with each other—in terms which the buyer can compare and understand—without the

necessity of assuming the risk and trouble of correctly determining transportation charges, etc.

*No loss of advantages of location.* Under multiple basing-point selling, the buyer receives the advantage of his location. Distant mills meet or cut below prices of nearer mills. Excluding distant mills would not give the buyer any lower price, and probably would result in higher ones.

*Imports—would exclude American products from seaboard.* Cheaper ocean freights and cheaper cost of production abroad would enable foreigners to acquire a monopoly of the seaboard business if American inland producers were not allowed to absorb freight to meet port prices. Examples are copper, beet sugar, corn sugar, potash and cement.

*Exports would be impeded.* The Commission's order in the *Rigid Conduit* case, requiring uniform mill-nets, would even apply to shipments to foreign markets where conditions cannot be foreseen and transportation costs and prices vary.

II. *Such revolutionary changes are for Congress and not for the courts.*

*Revolution—not interpretation.* The Commission's theory is not a mere application of the words "unfair competition" in the Federal Trade Commission Act. The prohibition is not directed at something generally conceded to be immoral or unfair.

It would work and is intended to work a complete revolution in the whole economic structure of the United States. It is not supported by any substantial body of public opinion. It is not desired by buyers or by sellers. There is no substantial evil to justify the destructive consequence which would follow.

Responsibility for such fundamental changes should not lightly be assumed by anyone. They were never contemplated or discussed in connection with the passage of the Federal Trade Commission Act. If made at all, they should be made only by Congress after full hearing and full debate, and by unequivocal language. Congress has in fact considered these very changes—and has consciously rejected them.

III. *The Commission is asking this Court to do by judicial legislation what Congress has repeatedly refused to do.*

*High tide in judicial usurpation.* As the court below said in the new *Cement* case (p. 573) for the courts to legislate into effect such fundamental changes—especially after they have been repeatedly considered and rejected by Congress—would be "the high tide in judicial usurpation."

IV. *Past agreements cannot justify prohibition of future individual freight absorption.*

It cannot be prohibited as a penalty.

If the right of individual freight absorption is to be more than a mere pretense, it cannot be prohibited under any theory of continuance of agreement, inferred from acts which are normal, inescapable and lawful *per se.*

V. *Under the Commission's theory there would be no practical way of complying with its order except by abandoning individual freight absorption.*

In view of the Commission's express attitude, industry needs a clear statement that effectively preserves the right of individual freight absorption.

VI. *This Court is not bound by the Commission's action either as to (1) the construction of the law, or (2) the inferences to be drawn from testimony of experts, or (3) findings which are incredible or not supported by substantial evidence.*

## THE ARGUMENT.

### I.

**Individual freight absorption to meet competition is a normal, natural and usual method of doing business. It has never been considered immoral or unfair. It is not unlawful *per se.***

Since time immemorial, it has been the custom of merchants to send their goods to distant markets—by camel or by clipper ship or more recently by railroad—to be sold at the prices there prevailing.

That is the way the commerce of the world has grown. That is the way industrious communities have prospered. No country in the world has ever forbidden its citizens to carry on ordinary business in that manner. Nor has it ever been regarded by any substantial body of opinion as immoral or unfair.

In the new *Cement* case, the court below recognized this fact when it said (p. 573) that the basing-point system of selling has been used in this country for almost half a century.

In the *Rigid Conduit* case, there is no evidence and the Commission made no finding that the basing-point method of selling originated in any collusion between the rigid conduit producers. The practice was already in use by August 1, 1913, when the first price cards began to be issued by the appellants.*

In any particular market, the seller must adjust his own price to meet the market price or retire from that market altogether.

The buyer is not interested in the seller's cost of transportation—or in any other factor of the seller's cost. It is the buyer who compels sellers to meet the prices locally prevailing.

The meeting of competition is not only natural—it is inevitable and inescapable. That is the way in which competition normally expresses itself. The right to meet lawful competition is an inherent right of private business.

---

* Finding 4(a), 38 F. T. C. 560, says:

> "For a long period of years respondent conduit sellers have used a delivered-price, basing-point system of quoting prices for and selling conduit. The manufacture of conduit had its origin a few years before the beginning of the present century."

The first reference in the findings to any collective action whatever regarding the basing-point method of selling is with respect to a simplified method of computing delivered prices put out in 1930. (Finding 4(b), 38 F. T. C. 561).

This Court recognized it as a normal and inherent right in the case of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1 (1927).

In that case a State anti-discrimination statute denied the buyer the right to vary his prices in different locations to the extent necessary to meet competition. This Court held that this denial was so arbitrary as to be unconstitutional saying (p. 8):

> "Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequent. • • • Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse."

In *Cement Manufacturers Protective Ass'n* v. *United States*, 268 U. S. 588 (1925) (hereinafter called the old *Cement* case)—this Court again recognized that meeting competition by use of the basing-point system is normal, is "natural" and not illegal *per se*. This Court said, (p. 598):

> "The use of basing points • • • appears not to have been the result of any collective activity on the part of defendants or cement manufacturers generally, nor were they arbitrarily selected. *Their use is rather the natural result of the development of the business within certain defined geographical areas.* When a manufacturer establishes his factory at a given point of production and sells his product in a territory which is contiguous freightwise to his factory, other mills established in the vicinity and serving the same territory, in order to compete in that territory • • • must sell at a mill price which will • • • enable them to compete with the mill or mills located at the basing point."

The effect of the old *Cement* case upon the issues here involved was summarized by the court below as follows (p. 570):

> "In summarized form, the Supreme Court found nothing wrong with the use of the basing point sys-

tem, the absorption of freight in order to compete in a freight disadvantage territory, even though it resulted in a uniform delivered price, and further, that a uniform delivered price resulting from the use of such system did not constitute a restraint on competition under the Sherman Act."

In *Corn Products Refining Co., et al.* v. *Federal Trade Commission,* 324 U. S. 726 (1945), the question as to the right of distant competitors to meet the competition of freight-wise nearer mills was not involved. This Court distinguished its decision in the old *Cement* case on that very ground, saying (p. 735):

> "In the Cement case, supra, the defendants used a multiple basing point system, with a basing point at or near each point of production. Under this system, any manufacturer, in order to compete in the territory closer freightwise to another, would absorb freight, by adjusting his mill price to make his delivered price as low as that of his competitors. Under this system the delivered price for any locality was determined by the nearest basing point."

In *Federal Trade Commission* v. *A. E. Staley Manufacturing Co., et al.,* 324 U. S. 746 (1945), this Court said that the Staley Company had never made any pretense of establishing a basing point at its own mill. It adopted as its own the illegal method of pricing of the Corn Products Company. If Staley had based its prices on its own mill and had absorbed freight to meet a lower competition of Corn Products where and to the extent necessary, it seems clear that the decision would have been otherwise. This Court expressly disclaimed any purpose to hold that such a method would have been unlawful, saying (p. 757):

> "But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitors' price, or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price."

Commenting upon the language quoted above, the court below said (p. 561):

> "Thus the court recognized that a seller may absorb freight when done in good faith to meet an equally low price of a competitor, even though a uniform delivered price at all points of delivery might result."

Neither is there any decision by any Circuit Court of Appeals which supports the Commission. No such case holds that individual—non-collusive—freight absorption to meet competition in good faith is illegal *per se*.

The following cases were all considered by the court below:

> *Salt Producers Ass'n, et al.* v. *Federal Trade Commission*, 134 F. 2d 354 (C. C. A. 7th 1943);
> *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (C. C. A. 7th 1944), *cert. denied*, 323 U. S. 730 (1944);
> *United States Maltsters Ass'n, et al.* v. *Federal Trade Commission*, 152 F. 2d 161 (C. C. A. 7th 1945);
> *Milk and Ice Cream Can Institute, et al.* v. *Federal Trade Commission*, 152 F. 2d 478 (C. C. A. 7th 1946).

They were all dismissed by the court below with the following comment (p. 572):

> "We therefore are of the view there is nothing in any of the cases decided subsequent to the old Cement case which in any way changes or modifies the holding that no restraint on competition was effected by use of the basing point price system."

Every one of those cases involved specific findings of agreement and collusion. None of them expressly applied to individual action. In two of them the Commission specifically disavowed any intention to attack individual action, and the court in the *Milk Can* case held (p. 483), relying on these disavowals, that the customary limitation in the preamble of the order—namely, to

> "any planned common course of action, mutual agreement, understanding, combination, or conspiracy"

meant exactly what it said—and should be so interpreted.

In the *Rigid Conduit* case, however, the Commission has abandoned all pretense of confining its order to agreements or conspiracies.

*These are test cases. The Commission has decided that the time has come to obtain a ruling which will outlaw individual action broadly—without limitation—forever.*

There is no authority on which it can rely. On the contrary, it is asking the courts to overrule all prior authority.

It is attempting to secure—by judicial legislation—something that Congress never contemplated when it passed the Federal Trade Commission Act. In effect it is asking the courts to pass legislation which Congress has refused to pass on numerous occasions, though urgently requested to do so.

**The Commission nullifies the right to meet competition—which is expressly recognized by the Robinson-Patman Act.**

The Commission in the *Rigid Conduit* case did not make any finding that the respondents had violated the Robinson-Patman Act. In this respect it differs from the new *Cement* case, where such a finding was expressly made.

The Commission probably decided to rest the *Rigid Conduit* case solely on the unfair competition section of the Federal Trade Commission Act, because it hoped thereby to avoid the specific exemption contained in the Robinson-Patman Act exempting action taken to meet competition. Under the Robinson-Patman Act—even where a discrimination is actually proved—it can be justified if given in good faith to meet an equally low price of a competitor.

In the new *Cement* case, however, the Commission unequivocally takes the position that individual freight absorption — even to meet competition — violates the Robinson-Patman Act and is not protected by the meet-competition exemption of that Act (C. Br. 104, 112). Thus, in effect, that exemption is practically nullified.

**Congress clearly intended to protect honest freight absorption to meet competition.**

Section 2 of the Clayton Act as originally enacted in 1914* provided that

> "nothing herein contained shall prevent discrimination in price * * * in the same or different communities made in good faith to meet competition:"

In 1936 some of the sponsors of the Robinson-Patman Act attempted to omit this exemption. Neither the House nor the Senate bill as introduced contained this defense.

It was obvious that its omission would have caused great hardship. It would have completely disrupted the method of manufacturing and distribution upon which the industry of the country had been built, and very probably would have made the Act unconstitutional.

Consequently, the exemption was re-inserted by both the House and Senate.

The language creating this exemption now reads as follows:**

> "*Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

It will undoubtedly be argued that this exemption is not a real exemption but merely allows the seller to introduce evidence—permitting the Commission to disregard that evidence and thereby do the very thing that Congress refused to do.

However, the language of the exemption is absolute. "*Nothing* is to *prevent*" the seller from "*rebutting*" the charge of discrimination by means of the meet-competition defense—if the seller acted in good faith.

If the Commission, at its will, wish or want, can *prevent* such evidence from "*rebutting*" the prima facie case, then

---

* 38 STAT. 730 (1914).

** Sec. 2(b) 49 STAT. 1526 (1936); 15 U. S. C. §13(b) (1940).

the exemption is a nullity. No rule or standard is laid down to guide the Commission in determining under what circumstances this defense is a bar to prosecution, and under what circumstances it is not. The language of the exemption is clear and contains no qualifications—other than the simple requirement of good faith.

The Commission was not given a blank check to write *into* the Act the very anti-basing point policy which was written *out* of the Act by Congress itself at the time the Act was passed.

The rejection of this policy by Congress is shown not only by the restoration of the meet-competition defense—but even more unequivocally by its simultaneous rejection of the Commission's mill-net definition of price.

This artificial mill-net definition of price was inserted into the original draft of the Robinson-Patman Act—for the very purpose of prohibiting the use of any basing-point-delivered-price-freight-absorption method of distribution. Subsection 5 of Section 2 of the Patman Bill, as reported in the House,* defined "price" as being

> "* * * the amount received * * * after deducting actual freight or cost of other transportation."

This is the same artificial definition of price—the "mill-net" definition—which is used by the Commission in its Findings in the new *Cement* case** and in its Findings and Order in the *Rigid Conduit* case.*** The extent to which

---

* H. R. REP. No. 2287, 74th Cong., 2d Sess. (1936), p. 2.

** Finding 24(a), (b). (R. 16127-28).

*** Finding 17(c), 38 F. T. C. 591

> "However, when such a seller quotes at destinations controlled by another base, he shrinks *his mill net or real price* by the exact amount necessary to produce at any such destination a quotation equal to the sum of the controlling base price plus delivery charge factor from that base".

That is merely a complicated way of saying that sellers in markets where they are at a freight disadvantage quote a delivered price to meet whatever price prevails there.

The order in effect forbids any method of selling that does not produce uniform "mill nets" (38 F. T. C. 595).

the Commission's argument is based on this artificial mill-net theory is shown by its constant repetition in the Commission's brief at pages 8, 24, 34 and 104.

The debates show that Congress understood clearly that the purpose of this definition was to do the very thing that the Commission is now attempting in this case—namely, to outlaw freight absorption by compelling sellers to quote f.o.b. point of shipment—and to get the same net at the mill regardless of the market in which their goods are sold. It provoked great opposition—particularly among farm leaders. It was stricken out by the unanimous vote of the House Judiciary Committee with the statement that otherwise the bill could not be passed.*

**What constitutes good faith is a question of law.**

The Commission argues that good faith is a question of fact, upon which the determination of the Commission is conclusive (C. Br., 113).

It may be that the *existence* of good faith is a question of fact, but what *constitutes* good faith is certainly a question of law, just as what constitutes unfair competition is a question of law.

Good faith has to do with honesty and good morals, not economic policy. The Commission cannot, under the guise of determining the existence of good faith as a question of fact, write back into the law a revolutionary and destructive economic policy which, when straight-forwardly presented to Congress, was stricken out of the bill and specifically rejected.

The Commission is trying to get this Court to find that Congress was wrong. The Commission is trying to smuggle the "mill-net" definition of price back into the law—disguised as a question of fact. That would indeed be an odd interpretation of the principle of "good faith".

---

* See citations and discussions *infra*, p. 56.

**Good faith requirement—satisfied by honestly meeting a price lawfully established by a nearer mill.**

The Commission argues (C. Br. 115, 116), that when a seller invades an area which is freight-wise nearer a competing mill, and meets there the competition of the nearer mill, it is not acting in good faith.

Such an argument might be addressed to situations where no effort has been made to find out what prices are being offered by the nearer mill and where the alleged meeting of competition is merely a subterfuge. But there are no such charges or findings in the present case, and the order is not directed at subterfuges.

Neither is this brief directed to the defense of subterfuges. This brief is directed to the normal situation where a seller has established a basing point at his own mill and only absorbs freight to meet competition in markets where he is freight-wise at a disadvantage.

The Commission attempts to persuade this Court that the decision in the *Staley* case supports the Commission's contention that such honest freight absorption is unlawful. We believe that this Court in the *Staley* case exercised the greatest care to avoid any such result. It particularly emphasized that the Staley Company had never made any pretense at establishing a base price at its own mill, but had merely adopted as its own and "slavishly followed" a system originated by the Corn Products Company, which this Court held was clearly discriminatory and illegal.

This Court said (324 U. S., at pp. 754, 757):

> "Respondents have never attempted to establish their own non-discriminatory price system, and then reduced their price when necessary to meet competition.
>
> * * * * * *
>
> "We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, at least where it has never attempted to set up a non-discriminatory system,
>
> * * * * * *
>
> But it does not follow that respondents may never absorb freight when their factory price plus actual

freight is higher than their competitors' price, or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price."

A ruling which finds bad faith in copying an illegal price does not warrant the Commission in denying good faith to a competitor who has established a basing point at his own mill and is selling upon that basis everywhere throughout his own freight-advantage territory—and who only absorbs freight in distant markets for the honest purpose of meeting *lawful* prices similarly established by a nearer competitor.

The theory of the orders in the new *Cement* and *Rigid Conduit* cases is that *never—under any circumstances*—would it be possible for a seller to be acting in good faith if he absorbs freight regularly to reach a freight-disadvantage market.

This in effect means that good faith is impossible and immaterial.

The short answer to such an argument is the one which was given by the court below (p. 560):

> "Of course, this presents the question as to whether freight has been absorbed 'in good faith.' In the Commission's hypothetical illustration *we cannot see the slightest reason for imputing to either base Mill A or C any other than good faith* in absorbing such freight as was necessary in order to meet the price of the other. It was imperative that each of these mills do so if they were to sell in the territory where the other had a freight advantage and, as already pointed out, *neither of them could have prevented the other from so doing.* The Commission, however, by its order would enjoin Mills A and C from so doing which *would, in our judgment, eliminate or at any rate nullify the proviso contained in Sec. 2(b) of the Clayton Act.* The Commission evidently recognizes its precarious situation in this respect, *which accounts no doubt for the fact that it continuously uses the word 'match' rather than 'meet'.*"

**No "discrimination" here.**

The word "discrimination" as used in the Act means more than mere "difference" or "variation" in price. It involves the existence of some relationship which entitles the customers in question to be treated alike. Representative Utterback, the Chairman of the Committee in charge of the bill, explained the meaning of the word "discrimination" before the House as follows:

> "In its meaning as simple English a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that *some relationship exists between the parties to the discrimination which entitles them to equal treatment*, whereby the difference granted to one casts some burden or disadvantage upon the other." (80 Cong. Rec. 9416.)

As the court recently said in *Morton Salt Co.* v. *Federal Trade Commission* (C. C. A. 7th May 27, 1947, CCH TRADE REG. SERV. Par. 57,569):

> "We take the view that discrimination within the meaning of the Act is not synonymous with harmless differentiation. * * * It is the act of unfairly, injuriously and prejudicially distinguishing between persons or objects, where economically speaking a sound and fair distinction does not exist."

There is no discrimination between the buyers in the same locality when all of them receive the same price. And the buyers in the home territory—the freight-advantage territory—of the seller who absorbs freight have no right to object. The buyers in the distant market would get the same price anyway from the seller located in that market. And the Act expressly recognizes that competition creates a dissimilarity of circumstances which justifies a "meeting" price.

This Court, in the *Staley* case, said that there is no discrimination under such circumstances, saying (p. 757),

> "But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitors' price, or

that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, *for in that event there is no discrimination in price.*"

**Freight absorption to meet lawful competition makes "due" allowance for differences in the cost of transportation.**

The Commission has a theory that the permissive language in the Robinson-Patman Act—permitting discriminations which make due allowance for differences in the cost of manufacture and delivery—is not permissive but mandatory.* Under that theory, the seller would be compelled—not permitted—to make up-charges for delivery amounting to the exact cost of transportation—no more, no less. Curiously enough, it would apply this theory only to costs of delivery—not to costs of manufacture and sale.

The relevant language of the Act is contained in the following proviso:**

"*Provided* that nothing herein contained shall prevent differentials which make only due allow-

---

* Paragraph (c) of the *Rigid Conduit* order forbids respondents individually from

"Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor *greater or less* than the actual cost of transportation from point of shipment to destination." (38 F. T. C. 595)

Paragraph 2(f) of the new *Cement* order forbids respondents from

"Quoting or selling cement at delivered prices which systematically include a common-carrier transportation factor *greater or less* than the actual cost of such common-carrier transportation from the point of shipment to destination." (R. 16136)

The findings in the new *Cement* case (Paragraph 24(d)), state—

"The failure to make due allowance for cost of delivery in such delivered prices automatically reflects itself in the varying mill nets. The systematic variations in mill nets resulting from respondents' pricing system are conditioned upon and are in proportion to the failure of the respective respondent sellers to make due allowance in their delivered prices for differences in their actual costs of delivery." (R. 16129-30)

** Sec. 2(a), 49 STAT. 1526 (1936), 15 U. S. C. §13(a) (1940).

ance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

This permits quantity discounts. It does not compel them.

It permits up-charges for costs of delivery. It does not compel them.

The language in the exemption permitting due allowance for cost of delivery does not distinguish between "cost of manufacture, sale, or delivery." If this is to be construed as mandatory—and as compelling prices which reflect the exact differences in cost of transportation—no more, no less—then by equal reasoning it compels prices which reflect the exact differences in costs of manufacture and sale.

The statute was never intended to produce such curious and impractical results.

And where the seller absorbs freight only where he is forced to—in order to meet the competition of a nearer mill—he is making only "due" allowance.

That differences in treatment of customers which only reflect differences in the competitive situation are not "undue" has been settled since long before the Clayton Act was passed, by the rulings of the Supreme Court under the earliest of anti-discrimination laws—the Interstate Commerce Act—passed in 1887. That Act prohibits "undue" discrimination between shippers and localities.* It is thoroughly well recognized that railroads can give lower rates to meet competition in localities where competition exists—even though those rates are lower, proportionately, than those charged where no such competition exists—and do not reflect the actual differences in the cost of transportation—on a mileage basis or otherwise.

*Texas and Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 197 (1896);

*Texas & Pacific Railway Co., et al.* v. *United States*, 289 U. S. 627 (1933);

* Sec. 3(1), 24 STAT. 380 (1887), 49 U. S. C. §3(1) (1940).

*United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499 (1935);
*Interstate Commerce Commission* v. *Louisville and Nashville Railroad Co.*, 190 U. S. 273, 280 (1903);
*Interstate Commerce Commission* v. *Chicago Great Western Ry. Co.*, 209 U. S. 108, 119 (1908);
*New Automobiles in Interstate Commerce*, 259 I. C. C. 475 (1945);
Cf. *United States* v. *Illinois Central Railroad Company, et al.*, 263 U. S. 515, 525, 542 (1924).

**No lessening of competition and no injury to competitors.**

Moreover, even though there were "discrimination," that alone is not enough. The Commission must show that the discrimination, to violate the Robinson-Patman Act, must also be such as will probably (1) lessen competition or (2) injure customers or competitors. *Morton Salt Co.* v. *Federal Trade Commission* (C.C.A. 7th May 27, 1947), CCH TRADE REG. SERV. Par. 57,569.

Obviously it does not lessen competition for General Electric to sell in a territory which is freight-wise nearer a competing mill. It increases competition. On the other hand, competition would be lessened by a denial of the right to absorb freight, because each seller would be compelled to retire from markets in which he is now selling, and the opportunity of buyers in those markets to choose between the present multiplicity of sellers would be destroyed.

Obviously there is no injury to the buyers in those markets where General Electric is freight-wise at a disadvantage because General Electric meets the prices currently charged there by the nearer mills. On the contrary, they have the additional benefit resulting from their opportunity to choose between additional sellers. And there is no charge or finding that all of the buyers at the same destination do not receive the same price.

Neither is there any injury to competition between buyers in different localities. The buyers in the distant markets are being offered just as favorable prices by the local sellers as those that they receive from the distant sellers. Moreover, the court below pointed out in the new *Cement* case that competition between buyers in different localities would not be affected because cement is used largely

> "in the construction of permanent structures. Such being the case, it is difficult to discern how there could be any competition, for instance, between purchasers of cement in Chicago and those in Kansas City" (p. 572).

The same is true in the case of rigid conduit.

Neither is there any legal injury to other sellers. It is not unfair for one seller to meet another seller's price in fair and open competition. No seller has a right to be protected against competition of that sort. It would be going very far indeed to say that such a right existed. Indeed, it is impossible to see how a free, competitive economy could exist where such a right to be protected against competition was recognized.

---

Consequently the Commission cannot claim that it can support its finding of unfair competition by showing violation of the Robinson-Patman Act. There is a four-fold answer:

(1) the Commission cannot rule out of the Robinson-Patman Act the defense of meeting competition;

(2) there is no "discrimination" in fact or law;

(3) honest freight absorption to meet competition makes "due" allowance for differences in cost of transportation; and

(4) meeting competition in freight-disadvantage markets does not diminish competition or injure buyers or other sellers.

**The Commission's interpretation of the law would result in Balkanizing the United States.**

Laying aside all the technical, artificial and confusing language employed by the Commission, the purpose of the Commission is to establish the principle that no producer shall have the right to sell regularly in areas freight-wise nearer to competing mills by absorbing freight for the purpose of meeting competition there.

These two cases are the climax of a campaign initiated by the Commission for the very purpose of having this principle adjudicated into law.

The inevitable result in practically all industries where freight is an appreciable factor would be to divide the country into a series of watertight compartments—a series of regional monopolies. Instead of being a united nation, this country would be turned into a group of little Balkan States. Each state would have perfectly definite boundaries. A producer inside one of these states could not sell outside those boundaries. Each producer in turn would be protected from outside competition—as by an impassable wall.

In many cases, this would lead to complete monopoly within such Balkan States.

In other cases, there would be "duopoly", or "oligopoly"—to use the semantic expressions of disparagement and disapproval employed where such situations are created by private parties.

These monopolies, however, would not be the result of any act or wish of the individuals concerned. They would result solely from the act of the Federal Trade Commission.

They would not be the result of the natural operation of the law of supply and demand. They would be wholly unnatural and artificial. They could not be maintained for one moment if the industry were freed from the straitjacket imposed by the Commission's order.

We have heard much of late with regard to the desirability of thinking in terms of "one world." We have heard much in opposition to trade barriers—whether by tariffs, cartels or otherwise—hampering the free flow of

commerce. The removal of such barriers has become the avowed purpose and policy of the Government. If new trade barriers are to be created—whether by tariff walls or freight walls—certainly Congress should create them—not the courts.

**The Commission's order would have precisely the same effect as an agreement among businessmen to divide territory.**

If business men should enter into a written agreement—in the precise terms of the order in the *Rigid Conduit* case—to the effect that they would each keep out of territory freight-wise nearer their competitors—such an agreement would be branded as a gross and palpable violation of the anti-trust laws.

Yet that in effect is precisely what the Commission would require them to do.

No more ingenious device for dividing territory could be imagined—and none which would be more practically effective.

**The effect would be to decrease competition—not to increase it.**

The Commission's argument is based upon the theory

(1) that allowing a multiplicity of sellers from far and near to sell in the same market, if they choose to do so, diminishes competition;

(2) that compelling all but one or two or a very few sellers to retire from a given market will increase competition.

The Commission seems to think that competition can be increased by driving out a multiplicity of sellers and handing each market over to a very few sellers.

The Commission's logic is this. Where a multiplicity of sellers are selling in the same market, the resulting price is a "monopoly price." But if all but one of those sellers should withdraw from the same market or be excluded by

the order of the Commission, the resulting price would be a "competitive price"—a price resulting from full, free and perfect competition.

As the court below said (pp. 557-8):

> "the restraint which the Commission professes to discern, effected by freight absorption, is insignificant as compared with that which would result if each sold only in its own backyard, as the Commission would have them do."

**Rigidity of prices would be increased.**

As previously stated, the Commission would divide the country into territorial compartments, each bounded by a freight rate wall.

No competitor could invade another's territory except at the cost of lowering his prices upon his entire output. He would not do this.

Such a costly over-all price reduction would not result in any proportional gain. The best he could hope to accomplish would be to push back the boundaries of that compartment for a few miles, and those boundaries would probably be immediately restored through corresponding price reductions by competitors.

A seller who has once retired from his freight-disadvantage territory would lose his sales outlets and customer connections there. He could not easily or quickly reestablish them. He would not be tempted to try to do so—since he could only expect that his occupancy of any strip of invaded territory would be merely temporary.

Consequently a seller would be most reluctant to reduce prices when the result would hold so little prospect of advantage—and where there would be so little pressure upon him to do so. In the end a live-and-let-live policy would develop, in which any attempt to invade the territory of another would be regarded almost as acts of aggression are where political boundaries are attacked.

A *status quo* would develop—and there would be no real incentive to alter it. The present flexible interpenetration of markets would end.

**Prices would not decrease. On the contrary, they would probably increase.**

A multiplicity of sellers in the same market has a strong tendency to keep prices down—even though some of the sellers are located at such a distance that they merely meet prevailing conditions and do not have price initiative.

Whatever the existing price level may be, it is entirely reasonable to suppose that it is lower than it would be if a large proportion of the competitors in each market were required to withdraw.

Under such circumstances nothing in reason suggests that prices would thereby become more flexible or decline. On the contrary, they would tend to stabilize—or, more probably, to increase.*

Furthermore, it is inevitable that if the country were divided into watertight compartments, the cost of production would be increased substantially—through the loss of the economies of large-scale production and distribution and through the relocation of plants at uneconomic locations—not determined by manufacturing considerations, such as proximity to raw materials and power sources—but entirely by artificial freight rates to markets.

**Widespread and destructive dislocation of existing capital investment.**

The heavy industries of the United States are, generally speaking, mass-production industries. They have grown up at points where available raw material, fuel, power and transportation to markets, all combine to give the lowest costs. By serving wide markets, they have been able to employ those mass-production methods which have made possible low prices and the rapid introduction throughout the country of improvements in the art.

The Commission would make freight rates alone the determining factor in location of plants. If producers had to retire from the markets they now serve, they would

* The court below so held in the new *Cement* case, p. 559.

have to cut down the production of plants which thus have lost their markets.

In many cases the result would be to favor large companies with multiple plants at strategic locations—or with the capital to build such plants. The Commission requirement would injure many producers who, for reasons other than freight rates; have located plants in small communities. It would militate against small communities generally, by causing plants to gravitate towards the large consuming centers offering the most concentrated markets.

In some cases it would be impracticable, if not impossible, to relocate the existing plants or to diffuse the industry throughout the country by building a multiplicity of small new plants.

In other cases the markets in which existing plants have a freight advantage would be insufficient to support them, and they would fail if they were excluded from more distant markets by being forbidden to absorb freight.

For example, it is difficult to imagine how the steel mill at Geneva, Utah, which has been regarded as so important to the development of Western industry, could possibly operate without the right to absorb freight to meet the prices of Eastern steel delivered on the Pacific Coast via the Panama Canal—or the prices of any local steel plants which may be established there. Obviously there is no substantial market for its output in the Rocky Mountains—and it will have to sell in various markets along the Pacific Coast where it is at a disadvantage freight-wise.

Another example is the potash industry in the United States. Prior to the First World War, substantially all the potash used in this country was imported from mines in Germany and in Alsace-Lorraine. Very serious difficulties were created by the cutting off of our potash supply during the war. Consequently, after the war, the Bureau of Mines in this country instituted a search for domestic sources of supply. As a result, potash deposits were eventually discovered in New Mexico, and their development began. Potash production also developed substantially in California.

The cost of labor and of water transportation was so much more favorable to the European producers, however, that the American producers were compelled, as a practical matter, to sell their product at the port price of the European potash plus inland freight.

Subsequently the Department of Justice indicted all the potash sellers in this country (both European and domestic), charging that they had agreed upon the selling prices. *United States* v. *American Potash and Chemical Corp., et al.* (Crim. No. 105-184, S. D. N. Y. 1939) 3 CCH TRADE REG. SERV. 8th Ed. Par. 15,086.

The defendants and the Department agreed to submit the matter to the Department of Commerce for suggestions. The Department of Commerce, after intensive study, recommended a price structure under which the American producers were to establish base prices at their own plants which would permit them to sell at their own base prices plus freight up to a line roughly as far east as the Appalachian Mountains. East of that line, along the Atlantic seaboard, the price structure suggested contemplated that the New Mexico producers should absorb freight—*i. e.*, should meet the price of European potash at American ports plus inland freight. Otherwise it was clear that the European producers would have swept the Americans completely out of those areas of the country where potash is principally used—and would have enjoyed a complete monopoly of the Atlantic seaboard.

This suggestion was accepted by the American producers by letters of intention addressed to Assistant Attorney-General Thurman Arnold. The report of the Department of Commerce and the letters of the American producers were put on file with the court in the Southern District of New York, and a consent decree was entered referring to these documents but not setting them forth in full. The suggestion was accepted as a matter of policy. The consent decree did not require it. *United States* v. *American Potash and Chemical Corp., et al.* (Civ. No. 8-498, S. D. N. Y. 1940) 3 CCH TRADE REG. SERV. 8th. Ed. Par. 25,461.

**Injury to buyers.**

It is very important to the buyer to be able to choose between a multiplicity of sellers. It gives assurance of competition in quality and service as well as price. All buyers desire the protection which comes from the existence of numerous alternative sources of supply—and the consequent assurance of sufficient and certain deliveries.

**The buyers themselves desire delivered prices.**

There can be no doubt that the buyers—as well as the sellers—would prefer to retain the existing delivered-price method of selling. This is not only for the reasons stated in the preceding paragraph, but for an additional reason.

What the buyer wants is a price under which he may know in advance exactly what the goods are going to cost him—at the place he wants to use them. He is not interested in the variations in the costs of transportation of different sellers any more than he is interested in any of the other elements of their other costs.

He does not usually have the facilities to figure costs of transportation of each product he buys—as sellers do for their own products—and he does not want the trouble and responsibility of doing so.

What the buyer wants are firm prices at his door—prices which he can understand and which he can compare with the prices of others—and prices which will not involve him in troublesome and unforeseen expenses and difficulties which he is not sufficiently versed in traffic matters to foresee and provide for.

Commenting upon this attitude of the buyers, the court below said (p. 573):

> "The Commission's order proposes to eliminate the sale of cement on a delivered-price basis, notwithstanding the almost unanimous desire on the part of dealers and purchasers that it be so sold."

And again (p. 541):

> " • • • dealers are practically unanimous in their desire to purchase on a destination price basis. The

Commission does not dispute this assertion; in fact, it substantially corroborates it.'"*

**No loss of advantages of location.**

Under a multiple basing-point system the buyer receives all the advantage of his location to which he is entitled. He is not deprived of any advantage because—in addition to the nearest mill—other more distant mills also sell in that area.

Excluding the more distant mills would not give him any lower prices. On the contrary, it would probably result in higher prices, inferior service, and less protection from interruption of supply.

If it be said that the buyer does not receive the advantage of his location where phantom freight is charged, the answer is that phantom freight is not the real issue in the new *Cement* or *Rigid Conduit* cases. It is not the issue to which this brief is directed.

All that General Electric is fighting for in this brief is the right to absorb freight—individually and without collusion. Such a right is indispensable to the continuance of its national business.

Phantom freight is not a necessary element in multiple basing-point selling. Counsel for the Commission conceded this in the new *Cement* case, and the court below commented upon that concession as follows (pp. 561-2):

> "Suppose all of respondents were base mills, as they might be in the exercise of their independent judgment, would they then be using the system of which the Commission complains? Notwithstanding

---

* Again, p. 554.

> "* * * sales are thus made [at delivered prices] because *the market for cement is invariably at the buyer's destination;* that is, the dealers whom the Commission characterizes as the 'backbone' of the business insist on knowing how much it will cost delivered This is also true generally of all purchasers of cement, including governmental agencies. That it is sold on this basis as a result of the demand of the buyer was conceded by counsel for the Commission on oral argument."

> the Commission in its brief contends that phantom freight is an 'inherent' element of the system charged in the complaint, counsel for the Commission in oral argument, in response to the conceded fact that all of the Pacific Coast respondents are base mills and collect no phantom freight, stated: 'I contend, and I shall show a few minutes later, that the existence of *phantom freight is not a necessary element in the multiple basing point system at all.*'"

The orders in these cases are not directed at *abuses* of the multiple basing-point method of selling. They are animated by the broad purpose of outlawing *any* method of distribution except the one in which the price is uniform f.o.b. the seller's mill.

Furthermore, the orders offer no remedy with respect to natural advantages. As the court below said (p. 563):

> "* * * One of its favorite themes is that the basing point system operates to nullify the natural advantages and disadvantages of location of the respective mills when quoting in a given territory. The Commission states: 'Under any kind of pricing method every mill has a substantial and naturally inherent advantage when quoting on nearby business in real competition with more distant mills. By the same token every mill has a substantial and naturally inherent disadvantage when quoting on distant business in competition with mills located nearer to the customer.' This appears to be a logical statement but the question immediately arises as to how the Commission proposes to give effect to this 'naturally inherent advantage' and this 'naturally inherent disadvantage.' As we have already shown, *it proposes to make supreme the advantage of a mill selling in the territory where it has a freight advantage,* and to make its disadvantage so great when selling in a competitor's territory as to practically preclude it from entering that market. In fact, *the advantage and disadvantage would no longer be natural but artificial,* effected by the requirement that each mill sell on an f.o.b. mill price. The change from the present system to one conforming with *the Commission's order would be like jumping from the frying pan into the fire.*"

**Formula pricing not eliminated.**

"Formula pricing" is a catchword.*

The question whether meeting competition in a distant market is legal or illegal is not to be determined by the fact that in order to find out what price he has to meet, the would-be seller is compelled to go through a simple arithmetical computation.

This Court in the old *Cement* case described perfectly what the Commission now seeks to stigmatize as formula pricing. It said (p. 598):

> "Manufacturers customarily, and for the purpose of the convenient conduct of their business, maintain a uniform base or factory price, so far as the customers of the individual manufacturer are concerned. That is to say, the business is conducted on a 'one-price' basis. In order, however, to determine the delivered price, there must be added to the factory price of a given manufacturer, the cost of transportation to the point of delivery. Prompt quotation of a delivered price therefore involves the ability to carry out promptly the mechanical process of adding to the mill price, the cost of transportation to the point of delivery."

---

* Finding 18(a) in the *Rigid Conduit* case (38 F. T. C. 591) apparently condemns the use of a delivered-price formula on the ground that

> "* * * each conduit seller knows that by its use each will be able to quote a price at any given destination identical with the prices quoted by others *pursuant to such formula*, and thus *all users of the formula* will be enabled to present to a prospective purchaser a condition of matched prices in which such purchaser is isolated and deprived of any choice on the basis of price".

The following finding in the new *Cement* case refers to "formula pricing".

> "Par. 9. (a) Respondents' pricing formula, when supplemented by common freight factors, inevitably produces identical prices at any given delivery point by all sellers who use it". (R. 16023).

Continuing, the Court said (p. 599):

> "* * * the freight rate from the basing point is an essential element in making a delivered price, since selling by any particular manufacturer at the lowest of the delivered prices computed from several basing points is a necessary procedure in competing in the sale of cement."

Far from holding the use of such formula prices to be illegal, the Court held (p. 598) that

> "Their use is rather the natural result of the development of the business within certain defined geographical areas."

The Commission's formula—f.o.b. mill—or—f.o.b. mill plus actual freight to destination—is also a system of formula pricing. It is a far more rigid formula and a more rigid system than any now employed.

It would indeed diminish "matching prices"—to the extent that it excluded numerous competitors from territories in which they are now selling.

But within each Balkan area the formula would be perfectly well known. The mill base and the freight rates would be matters of public knowledge. There would be no difficulty whatever for any would-be competitor in finding out the market price which he must meet if he desired to sell at any point.

And if he lacked the requisite arithmetical ability—the buyers at that point would speedily inform him.

Matching prices is an inevitable concomitant of competition. It will occur under any system in which men do not compete blindly—with complete lack of knowledge.

The possibility of matching prices is merely one inescapable consequence of competition. It would still exist under the f.o.b. mill system in all markets to which two or more sellers have the same freight rates. But the volume, extent and effectiveness of *real competition* would be enormously reduced.

**Imported goods would drive American products from the seaboard.**

Imported goods—in many industries—would be able to exclude American products from the seaboard.

It is well known that in many industries the cost of production abroad is cheaper than in this country, and the cost of water transportation to our ports is cheaper than the rail freight from our inland centers of production to the seaboard.

The *Potash* case is an excellent example. But for the right to absorb freight to meet the competition of imported potash, the American product would have been swept clean from the Atlantic seaboard.

Copper is another example where the American price is set by the port price of copper from Katanga, Africa, and from Chile.

Sugar is another example. The beet sugar producers, the corn sugar producers (and the cane sugar producers for that matter), must meet the competition of cane sugar produced by cheap native labor in the Caribbean.*

Cement is another example where European labor costs are lower and where water transportation from Europe to the Atlantic seaboard costs no more than the rail transportation from Northampton, Pennsylvania.**

It is unnecessary to labor this point further. It is obvious that there must be many industries—in addition to those named—in which serious dislocations would result from the denial to inland producers of the right to absorb freight to meet the competition of imported products at the seaboard.

---

* In *United States* v. *Great Western Sugar Co. et al.*, 39 F. 2d 152, 155 (D. Neb. 1930) the court pointed out that:

> "The information shows that the market price of sugar in these United States is based on the price of imported cane sugar. Beet sugar cannot be sold higher than that, and admittedly the public will have to pay the cane sugar price, regardless of trade rivalries and acts of competition among the beet sugar companies."

** See brief for the Cement Institute, p. 215.

**The Commission's theory would impede exports.**

The order in the new *Cement* case is limited to interstate commerce, but the Commission takes in the whole world in the *Rigid Conduit* order. There it requires uniform mill-nets on all shipments, both domestic and foreign.

Steamship rates are notoriously unstable. Prices in different foreign markets are not the same—and they differ in the same foreign market from time to time.

Obviously Americans selling in foreign countries must meet the prices there prevailing. It would be impossible for American manufacturers to export at all if they were compelled to sell in all the markets of the world at prices which would give them the same net realization f.o.b. mill on all sales, both foreign and domestic.

## II.

## Such revolutionary changes in our national economy should be made, if at all, by Congress, and not by Judicial Legislation.

**Revolution—not interpretation.**

The Commission's theory is not a mere "interpretation" of the words "unfair competition" in the Federal Trade Commission Act. It attacks a method of distribution under which our heavy industry has been built up. It is intended to work a complete revolution in our economic structure.

The court below understated the situation when it said that this method of distribution had been in operation for at least half a century. It has been in operation from time immemorial—not only here but everywhere where men send goods to distant markets.

The Commission is not attacking something which is generally conceded to be immoral or unfair. The Commission's theory is not supported by any substantial body of public opinion.

It is attacking something which is in universal use—and whose continuance is desired by buyers and by sellers alike.

There is no substantial evil to justify the destructive consequences which will follow. The Commission would create new evils which would be worse than the situation which the Commission seeks to change.

*Nothing in the history of the existing anti-trust laws indicates any intention of Congress to bring about this revolutionary change.*

If Congress had intended to adopt a principle not only revolutionary—but ruinous to the economy of the United States—it could have found apt words to do so.

Such an intention should not be inferred from general language. It could only be inferred from the most unequivocal language deliberately adopted after full debate and with complete understanding of the consequences.

In fact apt words were suggested and full debate was had at the time of the passage of the Robinson-Patman Act. Those apt words were stricken out. They were not dropped by inadvertence. They were stricken out deliberately—upon the statement of the managers of the Act that such opposition had developed from farmers and others that unless those words were eliminated the Act could not be passed.

No inference of any intention to produce such revolutionary changes can be drawn from such vague phrases as the phrase "unfair competition" in Section 5 of the Federal Trade Commission Act, enacted over 30 years ago. There is not a word in the debates of Congress or in the reports of the committees attending the passage of that Act in 1914 which indicates that selling upon a delivered-price-meet-competition basis was in any way deemed to be unfair. Lists of unfair practices were read into the debates—but nowhere was selling on a delivered-price-meet-competition basis referred to as within the evils against which the Act was passed.

On the other hand the Clayton Act—which was passed at substantially the same time—expressly provided, in Section 2, that

"nothing herein contained shall prevent discrimination in price * * * in the same or different communities made in good faith to meet competition:"

This language obviously reflected the spirit in which both the Clayton Act and the Federal Trade Commission Act were passed. It was intended not to destroy but to protect the very thing which the Commission is now seeking to destroy by "interpretation."

This whole theory of the Commission is an afterthought —which has been pressed with great zeal by a mere handful of men. It is not supported by Congress. It is not supported by public opinion. It has no support whatever among business men—whether buyers or sellers. We venture to assert that it has no wide support even among academic economists.

## III.

**The Commission is asking this Court to do by Judicial Legislation what Congress has repeatedly refused to do.**

The Commission is asking this Court to put into effect—by interpretation—an economic policy which Congress has repeatedly refused to adopt.

Congress has indicated its refusal upon the following occasions:

1. In 1914—in the proviso of Section 2 of the Clayton Act.
2. In 1936, when the so-called "Anti-Basing-Point Bill" sponsored by Senator Wheeler was considered and dropped.
3. In 1936, in connection with the passage of the Robinson-Patman Act.
4. In 1940 and thereafter, when it refused to pass the anti-basing point legislation urged by the Commission before the TNEC and recommended by the TNEC to Congress.

**The Clayton Act in 1914.**

Section 2 of the Clayton Act—in its original form—is the precursor of the Robinson-Patman Act. It contained a general provision against price discrimination. It was directed primarily at local price cutting.* It contained an express exemption which protected the meeting of competition in good faith by absorbing freight. This exception reads as follows:

> "nothing herein contained shall prevent discrimination in price * * * in the same or different communities made in good faith to meet competition:"

Because of this exemption, the Commission never claimed that Section 2 of the original Clayton Act made freight equalization illegal *per se*. The Commission never brought any suits either under the original Clayton Act or under the unfair competition section of the Trade Commission Act, directed against the use, without collusion, of the multiple basing-point method of selling. On the contrary, it sought further legislation to enable it to do so.

**The Wheeler Bill in 1936.****

The Wheeler Bill embodied the Commission's theories as to the necessary legislation. It was entitled a bill "To Prevent Unnecessary and Wasteful Cross-Hauling" and was popularly referred to as the "Anti-Basing-Point Bill".

---

* The local price cutting aimed at was of the type condemned in connection with some of the earlier practices of the Standard Oil Company, such as those referred to in the cases of *Dunshee* v. *Standard Oil Company*, 152 Iowa 618, 132 N. W. 371 (1911); *State* v. *Standard Oil Co.*, 218 Mo. 1, 426, 441-445, 116 S. W. 902 (1909); *State* v. *Standard Oil Co.*, 111 Minn. 85, 126 N. W. 527 (1910). See page 8 of H. R. Rep. No. 627, 63rd Cong. 2d Sess. (1914).

Such local price cutting was ephemeral in character—intended not for the legitimate purpose of meeting competition—but for the purpose of driving a competitor out of business.

The meeting of competition by bona fide freight absorption is not at all like local price cutting—temporary in character—for the purpose of putting a competitor out of business.

The difference between competing to get business and competing to "get" a competitor is obvious—and has long been recognized.

** S. 4055, 74th Cong., 2d Sess. (1936).

One of the Commissioners appeared and supported the Bill before the Senate Committee on Interstate Commerce, saying:

> "It is a matter of policy for Congress to determine whether the employment of the basing point systems shall be specifically banned by statute. * * * We believe that S. 4055 is drafted in proper form to attain that end."*

Extensive hearings were held—and the legislation was demonstrated to be unwise. Accordingly, the bill was dropped—without even a report by the Committee—though Senator Wheeler, the sponsor of the bill, was the Committee chairman and could certainly have brought it to a vote on the floor of the Senate if he had so desired.

**Robinson-Patman Act Proceedings in 1936.**

Congress again refused to follow the Commission's theories at the time of the passage of the Robinson-Patman Act. It manifested its refusal by two acts:

(1) *Congress deliberately and consciously refused to accept the "mill-net" definition of the word "price" as—*

> "the amount received * * * after deducting actual freight or cost of other transportation."

This is the same mill-net definition of price upon which the Commission has based its argument in the present case (C. Br. 8, 24, 34, 104). It was frankly intended to compel the seller to quote f.o.b. point of shipment—and to abandon freight absorption. It provoked great opposition—particularly among farm leaders. It was stricken out of the bill by unanimous vote of the House Judiciary Committee, with the statement that otherwise the bill could not be passed.**

---

* *Hearings before Committee on Interstate Commerce on S. 4055*, 74th Cong. 2d Sess. (1936), p. 325.

** See statements by Congressmen Patman, 80 Cong. Rec. 7760; Boileau, 80 Cong. Rec. 8122; Crawford and Miller, 80 Cong. Rec. 8126-7; Robsion, 80 Cong. Rec. 8130; Ramspeck, 80 Cong. Rec. 8226 (1936).

Senators Borah and Van Nuys agreed that the bill as finally passed had no effect on basing points, 80 Cong. Rec. 9903-4 (1936).

For a well reasoned statement of the reasons why one of the Judiciary Committee members opposed the "anti-basing-point" provision, see the speech of Congressman Citron, 80 Cong. Rec. 8223-4.

(2) *Congress deliberately and consciously rejected the attempt to eliminate from the new anti-discrimination law the meet-competition defense.* As shown above, that defense had been in the original anti-discrimination Act (Section 2 of the Clayton Act) ever since its adoption in 1914. It was omitted from the Robinson-Patman Act as originally offered in 1935 in the Senate by Senator Robinson and in the House by Representative Patman.* The meet-competition defense was inserted by the Senate itself by an amendment on the floor,** and in the House by the Committee on the Judiciary***, as follows:

> "nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *."

**TNEC Hearings in 1940.**

During the TNEC hearings in 1940, the Commission again pressed for legislation which would outlaw meeting competition by freight absorption. Mr. Wooden, then Assistant Chief Counsel of the Commission, testified orally before the TNEC on behalf of the Commission, and filed a brief† which concluded as follows (p. 14,598; reprint p. 140):

> "No more vitally needed legislation within the scope of the committee's functions can be suggested than that of *directly prohibiting the basing point system by Congressional mandate.*"

---

* S. 3154, H. R. 8442, 74th Cong., 2d Sess. (1936).

** 80 CONG. REC. 6426, 6435, 6436.

*** H. R. REP. No. 2287, 74th Cong., 2d Sess. (1936).

† *An Analysis of the Basing Point System and Delivered Prices as presented by United States Steel Corporation in "Exhibits No. 1410 and 1418"*, Exhibit No. 2242, *Hearings before TNEC* (1940) Part 27, p. 14,548, reprinted in TNEC MONOGRAPH No. 42 (1941) pp. 91-140.

In his oral testimony before the TNEC on January 30, 1940, Mr. Wooden specifically urged such legislation, saying:*

> "*as the situation is now*, with the outcome of any basing-point case depending upon the interpretation of the law and the facts under theories of *conspiracy and concerted action which, I think, are necessary to make the law applicable*, it requires an enormous expenditure of time and effort and labor * * * ".

Obviously, what Mr. Wooden desired was a change in the law. He desired a law which would enable him to obtain orders against sellers without producing evidence of wrongdoing. He desired that even affirmative evidence that the respondents were acting competitively and not by agreement should be excluded—as irrelevant.**

Pursuant to the Commission's request, the TNEC made recommendations that the law be changed in this respect.***

---

This Court reviewed this legislative history in the *Corn Products* case, and concluded that it evidenced a clear intention of Congress *not* to make the use of basing point systems illegal *per se*. It said (pp. 736-7):

> "The Commission undertook no further proceedings because of difficulties of enforcement which it attributed to the exemption provisions of Sec. 2 and to decisions of the lower federal courts in Clayton Act cases. *Instead it pressed for clarifying amendments to the Act.*
>
> • • • • • •
>
> "The practical effect of this provision [the mill-net definition of price] would have been to require that the price of all commodities sold in interstate commerce be computed on an f.o.b. factory basis, in order to avoid the prohibited discriminations in

---

* *Hearings before TNEC* (1940) Part 27, p. 14,329.

** The Commission again in 1944 and 1945 recommended that Congress take up "for serious concrete consideration" the various recommendations of the TNEC. FTC ANN. REP. (1944) p. 8; FTC ANN. REP. (1945) p. 9.

*** TNEC FINAL REPORT (1941) p. 33.

selling price. It would have prohibited any system of uniform delivered prices, as well as any basing point system of delivered prices. These effects were recognized in the Committee's report, see H. Rep. No. 2287, 74th Cong., 2d Sess., p. 14, and in the debates upon the Robinson-Patman Bill. Cf. 80 Cong. Rec. 8118, 8223-8224. *Indeed, the provision would have prohibited such a multiple basing point system as that in Cement Manufacturers Assn. v. United States, supra,* as well as the present system.

"*Such a drastic change in existing pricing systems, as would have been effected by the proposed amendment engendered opposition, which finally led to the withdrawal of the provision by the House Committee on the Judiciary.* 80 Cong. Rec. 8102, 8140, 8224. We think this legislative history indicates only that *Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se.*"

The court below correctly interpreted the foregoing language of this Court as a specific rejection of the Commission's theory that freight absorption is illegal *per se.* It said (p. 573):

"Furthermore, the basing-point price system has been in use by industry for almost a half century. There has been and is a marked diversity of opinion among economists, lawmakers and people generally as to whether it is good or bad. Numerous bills have been introduced in Congress seeking to outlaw its use. Countless time has been spent in hearings by Congressional committees, before whom it has been assailed and defended. The pages of the Congressional Record bear mute but indisputable proof of the fact that *Congress has repeatedly refused to declare its use illegal.* There is no occasion to relate this Congressional history. It is a matter of common and general knowledge. In the Corn Products case, the court in commenting upon some of this legislative history stated (324 U. S. at page 737): 'We think this legislative history indicates only that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal *per se.*'

*Notwithstanding this Congressional attitude as recognized by the Supreme Court, this court is now urged to hold that the system is illegal per se,* and to require that cement be sold on an f.o.b. plant basis.

"In our judgment, the question as to whether the basing point price system should be declared illegal rests clearly within the legislative domain. *We know of no criticism so often and so forcibly directed at courts, particularly Federal courts, as their propensity for usurping the functions of Congress. If this pricing system which Congress has over the years steadfastly refused to declare illegal, although vigorously urged to do so, is now to be outlawed by the courts, it will mark the high tide in judicial usurpation".*

The Commission is now asking this Court to assume the function of Congress and to legislate in matters where Congress has not merely been inactive. Congress has expressly rejected the Commission's theory.

In *United States* v. *Cooper Corporation,* 312 U. S. 600 (1941), this Court said (p. 606):

"The recent expressions of this Court in *Tigner* v. *Texas,* 310 U. S. 141, 148, 149, warn that it is not for the courts to indulge in the business of policy-making in the field of anti-trust legislation."

## IV.

**Past agreements cannot justify prohibition of future individual freight absorption.**

**It cannot be prohibited as a penalty.**

The Federal Trade Commission Act is not punitive. It is merely remedial. The Commission cannot impose outlawry—or deprivation of normal civil rights.

There is no reason why the parties to an illegal agreement may not abandon that agreement, and thereafter have all the rights which other men enjoy.

There are normal economic reasons for the universal use of freight absorption. These reasons are not dependent upon agreement in any way. It is not charged or found that the use of freight absorption in either the cement or rigid conduit industry originated in any agreement. In both cases, it arose spontaneously for natural business reasons.

These reasons antedate any agreement that is charged in either case.

They would survive any such agreement. There is no finding and no evidence that they would not do so.

Agreement or no agreement, the Commission has no power to forbid the independent use by individuals of a method of selling which would have a normal reason for surviving agreement and is not illegal *per se*.

As this Court said, in *Peoria Gas & Electric Co.* v. *Peoria*, 200 U. S. 48, 56 (1906):

> "Parties making an agreement, unlawful by the anti-trust act, may while the agreement is in force be subject to its penalties, but whenever they cease to act under it the penalties also cease. The punishment adheres to the offense and stops when the offense itself stops."

In *Salt Producers Ass'n, et al.* v. *Federal Trade Commission*, 134 F. 2d 354, 360 (C. C. A. 7th 1943), even though the court found that illegal agreements had existed, it amended the Commission's order to make it clear

> "* * * that such enforcement order does not invade any legal rights which are theirs, when separated from the illegal conspiracy, * * *."

This Court, in the case of *Hartford-Empire Co., et al.* v. *United States*, 323 U. S. 386 (1945), struck out of the decree below provisions which it regarded as punitive, and held that practices which were normal and innocent—but which had been used as part of an illegal conspiracy—could not be sweepingly prohibited on that account, saying, (p. 409):

"* * * *we may not impose penalties*[4] in the guise of preventing future violations. This is not to say that a decree need deal only with the exact type of acts found to have been committed[5] or that the court should not, in framing its decree, resolve all doubts in favor of the Government,[6] or may not prohibit acts which in another setting would be unobjectionable. But, even so, the court may not create, as to the defendants, *new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people,'* as the Government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt;' enjoin 'all possible breaches of the law;'[7] or cause the defendants hereafter not to be under the protection of the law of the land.'[8]"

**Individual freight absorption cannot be prohibited under any theory that a continuance of past agreements should be inferred from acts which are normal, inescapable, and lawful *per se*.**

The order in the new *Cement* case* (R. 16135) prohibits the petitioners from

"continuing * * * or carrying out any planned common course of action * * * between and among any two or more of said respondents * * * to [quote on or sell] cement * * * in accordance with any other plan or system which results in identical price quotations or prices * * *."

---

"[4] Standard Oil Co. *v.* United States, 221 U. S. 1, 77-78.

[5] Ethyl Gasoline Corp. *v.* United States, 309 U. S. 436, 461.

[6] Local 167 *v.* United States, 291 U. S. 293, 299.

[7] Swift & Co. *v.* United States, 196 U. S. 375, 396; Labor Board *v.* Express Publishing Co., 312 U. S. 426, 433, 435-6.

[8] New York, N. H. & H. R. Co. *v.* Interstate Commerce Comm'n, 200 U. S. 361, 404; Standard Oil Co. *v.* United States, *supra*, 80."

---

* The collusion paragraph of the order in the *Rigid Conduit* case is to the same effect (38 F. T. C. 593, 594).

Under the wording of this paragraph the Commission may say that no two manufacturers may continue independently any method of doing business which the Commission finds ever to have been planned, no matter how natural or normal—or inevitable—that course of action may be.

In view of the Commission's attitude General Electric feels that it cannot act safely in the normal conduct of its individual business unless the interpretation of this provision is further clarified by this Court.

General Electric is not asking to be allowed to defeat or evade any order directed at really collusive practices.

But General Electric does not want to be in a position where it will be constantly *in terrorem* because of any theory on the part of the Commission that the irreducible minima of selling at all will constitute collusion—and will involve it in charges that it is selling in *continuance* of some past illegal agreement or, in the words of the order, that it is continuing a common course of action that was once planned.

General Electric in the past has absorbed freight to meet competition of other mills. Obviously it will have to continue to do so—unless it is to retire from selling in the great area in which it is freight-wise at a disadvantage.

It has always issued price lists. It will have to continue to do so.

Whatever changes General Electric or its competitors may make from time to time in their price lists—sooner or later the pressure of competition will almost inevitably force the published price lists of others to become substantially the same. The court below so held in the new *Cement* case (p. 568).

General Electric cannot keep others from meeting its prices. General Electric must meet the prices of others or retire from the market. Competition is as simple as that.

There is nothing artificial about these elementary facts. They are natural. They are inescapable—if General Electric is to continue to compete at all in its present markets.

This Court should make it clear that from these facts alone the continuance of past agreements may not be inferred.

In the new *Cement* case the Commission in its brief here (C. Br. 19, 66) argues, as it did below, that any agreement with regard to freight absorption is "*self-perpetuating*" and that renewed understandings or agreements are not necessary. That argument was summarily disposed of by the court below as follows (p. 558):

> "The most illogical argument of all is that of the Commission that the concurrent use of this pricing method is proof of the conspiracy charged, this notwithstanding the fact that this method has long been in operation in the industry and that it was not initiated by the present respondents. As heretofore shown, the Commission found that the system 'is self-perpetuating' and that 'renewed understandings or agreements are not needed.' It seems obvious there was no reason why respondents should enter any agreement or understanding either at the time of the commencement of the conspiracy alleged or at any subsequent time".

General Electric respectfully asks, for its protection, that this Court make it clear that the "continuing" provisions of orders of this character are not to be so construed that members of an industry are forever debarred from honest, individual freight absorption.

*The Commission will have achieved indirectly what it could not have achieved directly.*

## V.

**Under the Commission's theory there would be no practical way of complying with its order except by abandoning individual freight absorption.**

If sellers are to have the right to continue to sell in freight disadvantage markets, this right must be more than a pretense.

It should not be acknowledged in theory and at the same time forbidden in fact, by interpreting the collusion paragraph of an order in such a manner that either the continu-

ance of past agreements—or the formation of new agreements—will be inferred from acts that are normal, inescapable and lawful *per se*.

It would be a hollow victory for industry if the Circuit Court of Appeals for the Seventh Circuit should strike out that paragraph of the *Rigid Conduit* order which is aimed in specific terms at individual action, but this Court should permit the Commission so to interpret the order in the new *Cement* case as to accomplish the same result.

Industry has good reason to fear that even if that paragraph aimed at individual action were stricken out, the Commission would still attempt to outlaw individual freight absorption by indirection—under the theories of interpretation which it would apply to the collusion paragraph.

It did so in the new *Cement* case in the court below—and the same theories are implicit in its argument here.

Before the court below, the Commission maintained boldly and with great determination that the order in the new *Cement* case should be and would be effective to outlaw even individual freight absorption. The attitude of the Commission was set forth by the court in its opinion in that case as follows (p. 543):

> "Moreover, paragraph 3 of the order appears to be directed against respondents in their individual capacity, thereby ignoring the charge of combination or conspiracy. As we understand the Commission's argument, it so concedes. It states: 'Paragraph 3 is by its nature applicable only to the respective corporate petitioners [respondents], but to a practice which to the extent used by all would in effect recreate the system and have the same effect in making delivered prices identical.' If our construction of this paragraph is correct, it means that *the charge of combination is little more than a pretense* to get all the members of the industry, leaders and followers alike, into the same proceeding and before the same court. Further, *this paragraph would prohibit each individual respondent from absorbing freight even though done in good faith to meet an equally low price of a competitor. That this is the Commission's purpose is in effect conceded.*

> In response to criticism directed at this paragraph by respondents the Commission states: 'This case will have been litigated in vain if petitioners' [respondents'] views prevail on this subject, even though other provisions of the order were to stand.' "

In order to reach this result, the Commission relied upon certain ingenious bits of verbal sleight of hand. It invented a number of euphonic forms of expression—all of which were intended to give lip service to the necessity of collusion—but in effect to hold that collusion would be conclusively presumed.

The Commission's arguments are:

1. That freight absorption is inherently collusive.
2. That simultaneous, individual action—with the kind of knowledge which every seller necessarily has—is the same thing as agreement.
3. That agreement will be presumed from uniformity of price.
4. That each seller "invites" other sellers to go into his territory, receiving a similar invitation in return—and that these reciprocal "invitations" amount to agreement.

These arguments were considered and rejected by the court below. The forms of expression are different, but they all amount to the same thing—namely, that it would be practically impossible for any businessman to continue to do business in territory freight-wise nearer a competing mill.

It would be futile for him to show that he had maintained his independence in the utmost good faith—that his selling was an act of fair though aggressive competition—that his action was actuated solely by his own independent judgment and upon sound business considerations—and that he had no obligation of any kind whatsoever toward any of his competitors.

In effect these arguments are merely camouflaged ways of saying that freight absorption is illegal *per se*.

**1. The argument that freight absorption is inherently collusive.***

This is a pure conclusion of law.**

It is tantamount to saying that individual freight absorption is illegal and that—in law—it makes no difference whether the act is collusive or not.

This conclusion of law is directly contrary to the holdings of this Court in the *Corn Products* case (p. 737) that the legislative history shows

> "• • • that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal *per se*".

Likewise the court below said (p. 573):

> "Notwithstanding this Congressional attitude as recognized by the Supreme Court, this court is now urged to hold that the system is illegal *per se*, and to require that cement be sold on an f.o.b. plant basis.
> "• • • If this pricing system which Congress has over the years steadfastly refused to declare illegal, although vigorously urged to do so, is now to be outlawed by the courts, it will mark the high tide in judicial usurpation."

**2. The argument that similar independent action —with knowledge—is the same thing as agreement.**

This, too, is an erroneous conclusion of law and contrary to fact.

Knowledge is one of the essential elements of perfect competition. Knowledge is indispensable to the normal operation of the law of supply and demand. Ignorance is not a virtue—and knowledge is not a crime.

---

* While the Commission here avoids the express use of the words "inherently collusive" which were contained in its brief below, nevertheless it makes the same argument in different words (C. Br. 37, 38).

** Moreover, it is contrary to the actual facts.

Obviously, when one seller invades the territory "naturally tributary to another," he is aggressively competing.

It is against all reason to suppose that sellers do not invade markets freight-wise nearer other mills except as the result of agreements with the competitor whose territory is invaded.

In every important industry, sellers issue price lists which are circulated widely among buyers. Sellers have traveling field-men whose duty it is to keep thoroughly and completely informed.

Prices and practices of sellers become known to the buyers as soon as published: That is the very purpose of publishing them.

If any seller does not discover his competitors' prices himself, the buyers—by their demands—see to it that he is informed of prices and practices of other sellers, and that he is compelled to meet them. It would be impossible for one seller to conceal his prices and practices from the others. The Commission itself so found, saying (Finding 9 (e) R. 16029):

> "When a corporate respondent makes a change in its base price, written delivered-price quotations reflecting this change are usually sent to all customers. Through common customers and through salesmen in the field, information concerning this change reaches the other respondents selling cement in that area almost immediately."

**The Commission says that the seller is bound to know. It says that it is the seller's duty to know.* But it also says that if he does know, he is guilty of collusion and is violating the law.**

---

* In *Samuel H. Moss Inc. v. Federal Trade Commission*, 148 F. 2d 378, 380 (C. C. A. 2d 1945), *cert. denied*, 326 U. S. 734 (1945) Judge Learned Hand summarized the Commission's position to the effect that the meet-competition defense imposes a duty on anyone who sells at different prices to

> "prove that he *knew what was his competitor's price*, must mean not to undercut it, and must offer to sell at what he knows to be no lower than his competitor's price".

In the *Staley* case, the Supreme Court said (p. 759):

> "The Commission commented * * * upon the entire lack of a showing of diligence on the part of respondents to verify the reports which they received, or to learn of the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact be meeting the equally low price of a competitor."

The Commission cannot obliterate the distinction between similar *individual* action—and agreed, *collusive* action. This distinction exists in fact and is recognized in law. There is no finding in this case that the act of meeting competition is in fact always and necessarily action by agreement. There is no evidence which would support such a finding.

No evidence could possibly support such a finding, because it would be contrary to common knowledge. This Court in the old *Cement* case, rejected the Commission's present argument as a matter of law, saying (p. 606) that the Government had failed to show

> "* * * any concerted action other than that involved in the gathering and dissemination of pertinent information * * *"

and that it had failed to show

> "* * * any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action."

In the case of *Salt Producers Ass'n, et al.* v. *Federal Trade Commission*, 134 F. 2d 354 (C. C. A. 7th 1943), the court also rejected the Commission's theory that concurrent individual action is the same thing as agreement. In that case, the Commission's order prohibited broadly *any* "common course of action." The court held this order (p. 357) beyond the power of the Commission. It limited the order to a "*planned* common course of action",

> "so that only illegal *contractual* arrangements will be subject to contempt proceedings." (Court's italics.)

**3. The argument that agreement will be presumed from uniformity of price. The descending spiral theory of competition.**

It is the Commission's theory that uniform prices would be proof of collusive action in violation of the collusion paragraph of the order. This again is an erroneous conclusion of law—and contrary to the facts.

**(a) Substantial uniformity would exist under any pricing system.**

It is universally recognized that in the case of a standard commodity—such as rigid conduit or cement—prices in the same market inevitably tend to become uniform.

This is a principle as normal and inescapable as the law of gravitation.

The Commission admitted in its findings in the *Rigid Conduit* case* that

> "in a truly competitive market the unit price of a homogeneous commodity tends to become approximately uniform * * *."

This principle of economics was recognized and adopted by this Court in the old *Cement* case (pp. 605-6) in language quoted *infra* page 75 and therefore not repeated here.

**(b) Uniformity not the result of the basing-point system.**

The Commission takes the position, however, that while prices may tend to become uniform under ordinary conditions, nevertheless—for some unknown reason—this principle does not apply to a market in which a multiplicity of sellers—from far and near—are competing under conditions whereby some of the sellers are compelled to absorb freight.

The Commission argues that uniform prices are the result of the basing-point method of selling (C. Br. 65, 66).

The truth is that the basing-point method of selling is the result of the same competitive compulsion that forces sellers in the same market to meet each other's prices there.

The lower court so held. It specifically found that uniformity in cement prices was not the result of the use of the multiple basing-point system. It held that a similar uniformity would exist under any conceivable system, *including the f.o.b. mill system desired by the Commission.*

---

* 38 F. T. C. 592.

Consequently it held that the use of a basing-point method of selling accompanied by uniformity of prices gives rise to no inference of collusion. It said (p. 568):

> "As already shown, buyers will not pay more for one brand of cement than another. Of course, it must be true, as the Commission asserts, that it does not follow but that they would like to pay less. If, however, one seller made a less price all others selling at the same point would 'almost immediately' learn of this fact and be compelled to reduce their price accordingly or abandon the market. If they pursued the former course, the price at that point would again become uniform, or, in the language of the Commission, identical.
>
> "Under the circumstances shown, we think it is *the inevitable result of any pricing system that cement must be sold at the same place at a uniform price* whether it be at the point of production or that of destination. Suppose the Commission's order becomes effective, can it be doubted that the plant price of cement of producers located in the same area will be uniform? If one producer persists in selling for more than the others, his customers will be lost. If he sells for less, the others will be compelled to lower their price to the same level, or forego the business. *Further, if they sell at a uniform price it will immediately create, according to the Commission's theory, an inference that they are acting in collusion.*"*

Similarly, in the same opinion, the court said (p. 565):

> "It should be remembered in this connection that the combination alleged is the employment of the basing point price system which results in identical delivered prices. We think we have heretofore demonstrated that *the same result would ensue as the*

---

* Thus—as the court below points out—the Commission's theories as to the illegality of "matching prices"—would be just as applicable to sales by two or more competitors at uniform prices within their own freight advantage area if every disadvantaged seller retired from the field and no freight absorption existed.

It would be unsafe for two such competitors to issue price lists, quoting the same f.o.b. mill prices—even if they sold exclusively within their freight advantage territory.

*result of any pricing system* and whether used *individually* or in combination.'"*

The same question—*i. e.*, whether agreement should be inferred from the use of the multiple basing-point system—was passed upon by this Court in the old *Cement* case. The Court said (p. 598):

> "The use of basing points * * * is rather the natural result of the development of the business within certain defined geographical areas. When a manufacturer establishes his factory at a given point of production and sells his product in a territory which is contiguous freightwise to his factory, other mills established in the vicinity and serving the same territory, in order to compete in that territory, must either secure a like freight rate or they must sell at a mill price which will permit them to deliver cement at a price which will enable them to compete with the mill or mills located at the basing point which is the principal point of production in the territory which is contiguous in point of freight rate to the basing point."

The court below said of the decision in the old *Cement* case (p. 570):

> "In summarized form, the Supreme Court found nothing wrong with the use of the basing point system, the absorption of freight in order to compete in a freight disadvantage territory, even though it resulted in a uniform delivered price * * *."

---

* The court below further emphasized this same point at pp. 563-4 of its opinion in the new *Cement* case, saying:

> "The Commission states: '* * * The effect of this situation is that each base mill has an area in which its base price is supreme and recognized as such by its competitors who do business therein.' * * * While perhaps this contention is valid theoretically, we think it is applicable to any pricing system and especially that which the Commission would impose. Certainly under any system each producer could determine the price at which its product was to be sold and such price would be supreme in its own territory, irrespective of what its competitors might do or think."

(c) Descending spiral theory of competition.

The Commission in the *Rigid Conduit* case found that "meeting competition" does not represent "competition in the ordinary meaning of that term".*

In the Commission's view, "competition" exists only where sellers continuously underbid each other. This means a continuously descending spiral of prices. Such a vicious spiral can end only in bankruptcy—and a general depression.** Business men who survived the panic in 1929 have learned to have a horror of such descending spirals.

It is common knowledge that under normal conditions prices eventually stabilize at a point below which sellers cannot or will not sell. Stability and the relative uniformity of prices which accompanies such stabilization is not collusive. Collusion implies voluntary agreement. There is nothing *voluntary* about such prices.

They are the result of *competitive compulsion.*

If business men can never conduct their business on the basis of meeting the market price—they cannot do business at all. They can only commit economic suicide.

The conditions in a commodity exchange—such as the Chicago Grain Pit—are not comparable with the market conditions under which manufactured goods are sold. In a commodity exchange, the buyers and sellers are all assembled in the same room, and every sale is an auction.

But manufacturers must arrange production schedules months in advance. They must issue catalogues and price lists. They must hire forces of salesmen. They must treat their customers on a basis of relative equality. As this Court said in the old *Cement* case—they become "one price companies".

---

* Finding 18(a) 38 F. T. C. 591.

The Commission makes substantially the same argument in its brief in the new *Cement* case, p. 43.

** The Commission's brief (p. 52) really admits this. After arguing that even sellers who are compelled to absorb freight must continue to under-bid each other—under pain of being illegally collusive—it ends by saying rather naively:

> "The process of thus easily becoming low bidder *could not, it is true, be indefinitely repeated.*"

Oriental higgling—like an Armenian rug merchant in a Cairo bazaar—is not possible—or desirable—under these conditions.

**(d) The Robinson-Patman Act exempts *meeting* prices—not *undercutting* prices.**

There are serious legal reasons why a seller who is compelled to absorb freight to reach a distant market should hesitate to do more than meet the prices of the nearby competitors.

The meet-competition exemption in the Robinson-Patman Act only sanctions price variations made in good faith *to meet an equally low price of a competitor.*

The Commission took that very position in *Samuel H. Moss, Inc.* v. *Federal Trade Commission,* 148 F. 2d 378 (C. C. A. 2d 1945), *cert. denied,* 326 U. S. 734 (1945). Judge Learned Hand for the court summed up the Commission's argument in that case as follows (p. 380):

> "The Commission appears to believe that, in order to prove the affirmative defense any one who sells at two prices must prove that he knew what was his competitor's price, must mean not to undercut it, and must offer to sell at what he knows to be no lower than his competitor's price".

He continued:

> "We agree that he must not undercut his competitor's price * * *."

On a motion to modify the decree, 155 F. 2d 1016 (C. C. A. 2d 1946) the court said:

> "Once the petitioner was shown to have charged different prices and failed to prove that this did not 'lessen competition,'* *it could not escape without showing that the offers which it made were either in fact no lower than that of its competitors, or that it did not mean them to be.*"

---

* *Morton Salt Co.* v. *Federal Trade Commission* (C. C. A. 7th May 27, 1947) CCH TRADE REG. SERV. Par. 57,569, held that the Commission must prove not only the different prices but also the adverse effect on competition.

The Commission regards freight absorption as discrimination. If it is right about that—then there is real danger that the meet-competition exemption protects only *meeting* —but not *undercutting*—the price of the nearby competitor. The initiative in price reductions would seem to have been transferred to the nearby mill.

(e) Uniformity of price recognized as normal.

That both stability and uniformity of prices are normal in the sale of manufactured commodities has been repeatedly recognized by the courts. In the old *Cement* case, Mr. Justice Stone said (pp. 605-6):

> "It is urged by the defendants that such uniformity of price as existed in the trade was due to competition. They offered much evidence tending to show complete independence of judgment and of action of defendants, by large expenditures in competitive sales efforts and by variations in the volume of their production and shipment, earnings and profits. A great volume of testimony was also given by distinguished economists in support of the thesis that, in the case of a standardized product sold wholesale to fully informed professional buyers, as were the dealers in cement, uniformity of price will inevitably result from active, free and unrestrained competition; and the Government in its brief concedes that *'undoubtedly the price of cement would approach uniformity in a normal market in the absence of all combinations between the manufacturers'.*"

In *United States* v. *International Harvester Company et al.*, 274 U. S. 693 (1927), this Court said (pp. 708, 709):

> "And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination."

In *United States* v. *Standard Oil Co. of New Jersey*, 47 F. 2d 288 (E. D. Mo. 1931), the court said (p. 316):

> "In the main, the prices are the same . . . . The reasons for such uniformity as exists are not far to

seek. * * * While there is sharp conflict in the evidence as to which company first makes changes in prices, it is evident that Socony could do so, and, if that change were a reduction, its competitors, generally speaking, would be compelled to follow that lead. But, even if it be taken that others, in this area, 'follow' (in the above sense) the Socony prices, that is not governing, because there is no element of compulsion or attempt at compulsion present, although it is, as contended, proof of its business power in this area. The undisputed facts that competitors, large and small, have increasingly come into this area, extended and expanded their businesses freely, and are doing so with increasing force, completely negative any finding of an attempt at compulsory price control or any such result in the sense of the Anti-Trust Act. * * *"

The court went on to discuss the practical business reasons which move men, acting wholly independently in the exercise of their own judgment, to avoid getting into a vicious spiral of price-cutting and said (pp. 316-7):

"* * * if the major companies follow the Socony prices in this area, they do so because they do not wish to engage in a price-cutting war which might entail losses to all concerned (including Socony) without any compensating benefits. Such a view has no sinister aspect, but is merely a matter of business judgment and prudence illustrated in every community in the country by retail competitors in all lines. [Citations omitted]. Grocers, butchers, and all other lines in the same markets generally sell the same things at the same prices, for the sound reasons that they wish to get all they can, that they cannot get more than the price at which the bulk of what is sold in their respective markets is selling, and that they do not think it wise to cut prices."

**4. The argument that "reciprocal invitations" amount to "agreement".**

The Commission seriously advances the theory that each seller "invites" his competitors to come into his natural market.

From these imaginary invitations, the Commission seriously believes that it is entitled to infer agreement. It did so in its findings* in the new *Cement* and *Rigid Conduit* cases—and it would very probably consider itself entitled to do so in the future—unless the sellers all retire from every market which is freight-wise nearer some other mill.

This finding is a mere conclusion—and one which is unsound in law and contrary to fact. There is no evidence whatever to support this conclusion—and the conclusion itself is against all common sense. No seller invites other sellers to invade his territory.

And how could any seller keep his competitors from doing so? He certainly would do so if he knew how. The very fact that his competitors do invade his territory is proof that competition is free.

The only way they could be kept out—would be by making competition "unfree".

The effect of the Commission's order is exactly that. It keeps competitors out of each other's territory. It creates artificial restraints of competition. It gives to each competitor a monopoly of "the available business in his natural market". It is a fantastic limitation on the competitive instincts of mankind.

This "invitation" theory of the Commission was rejected by the court below, as follows (p. 558):

> "Continuing with this hypothetical situation, how can there be the slightest inference that Mills

---

* *Rigid Conduit* case, Finding 18(a), 38 F. T. C. 592

> "Each participant in the use of this pricing formula consciously intends that no attempt be made to exclude any seller from the natural freight advantage territory of another and by the use of the formula *in effect invites others to share* the available business in his natural market in return for a reciprocal invitation".

New *Cement* case, Finding 23(c), (R. 16126)

> "The system contemplates, and in operation results in, each corporate respondent waiving his advantage in his natural sales territory in return for reciprocal waiver by the other corporate respondents."

A and C had an agreement to use the method depicted? *How could Mill A, if it desired to do so, prevent Mill C from coming over and selling in the territory in which the former had a freightwise advantage?* And conversely, how could Mill C prevent Mill A from doing likewise in the territory where C had a similar advantage? Moreover, *how could either Mill A or Mill C prevent the other from absorbing freight* in order to meet the price of the other? And how could either prevent the other from reducing its mill net in so doing?"

## VI.

**This Court is not bound by the Commission's action with respect to**

1. **Construction of the law.**
2. **The inferences to be drawn from the testimony of experts.**
3. **Findings which are incredible or not supported by substantial evidence.**

The issue presented by this brief is a pure question of law.

The basic facts on which that issue depends are simple. There is no substantial dispute concerning them. They lie within the field of common knowledge.

The legal conclusion to be drawn from these undisputed facts is the ultimate issue to be decided by the Court.

On questions of law, the Court is not bound by any conclusion drawn by the Commission. This is so clearly settled that it needs no extended argument.

In *Federal Trade Commission* v. *Gratz, et al.* 253 U. S. 421 (1920), this Court said (p. 427):

> "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good

morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

This case has been followed in many subsequent cases, such as:

*Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 579 (1923);
*Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 648 (1931);
*Federal Trade Commission* v. *R. F. Keppel & Bro. Inc.*, 291 U. S. 304, 341 (1934).

In *Hofeller* v. *Federal Trade Commission*, 82 F. 2d 647 (C. C. A. 7th 1936), *cert. denied*, 299 U. S. 557 (1936), Judge Evans stated (p. 650):

"Two matters in this field of law are well settled: (a) What constitutes unfair methods of competition is a question of law for the court, * * *"

The previous decisions of the courts are now affirmed by the recent Administrative Procedure Act, 60 STAT. 237, 5 U. S. C. A. §§1001-1011 (Supp. 1946) Section 10(e), which reads as follows:

"* * * the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by sub-

> stantial evidence in any case * * * reviewed on the record of an agency hearing provided by statute; * * *. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

The report of the House Committee on the Judiciary accompanying the bill said, with reference to the foregoing section,*

> "This section provides that questions of law are for courts rather than agencies to decide in the last analysis and it also lists the several categories of questions of law. * * *
>
> "'Substantial evidence' means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7 (c), and material to the issues. It is exceedingly important. Difficulty has come about by the practice of agencies and courts to rely upon something less—*suspicion, surmise, implications, or plainly incredible evidence.* Although the agency must do so in the first instance, under this bill it will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment whether on the whole of the proofs brought to their attention the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action or inaction. In reviewing a case under this fifth category the court must base its judgment upon its own review of the entire record or so much thereof as may be cited by any party."

Obviously, if the Commission itself cannot bind the courts by such ultimate conclusions, it cannot do so by purporting to rest its finding upon the opinions of experts.

The basic facts are perfectly plain. This Court is no more bound by the opinion of an economist that individual

---

* H. R. Rep. No. 1980, 79th Cong. 2d Sess. (1946), reprinted in *Administrative Procedure Act, Legislative History*, Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946), pp. 278-9.

freight absorption is illegal *per se*—than it would be by a similar legal conclusion on the part of the Commission itself.

This Court should reject the conclusions either of experts or of the Commission upon the issue of law—which is in the end the ultimate issue of the case.

The same economic testimony has been submitted both by the Commission and by Dr. Fetter to Congress itself. It was rejected by Congress. It should also be rejected by this Court.

## Conclusion.

**General Electric respectfully urges before this Court, as it is urging before the Circuit Court of Appeals for the Seventh Circuit in the *Rigid Conduit* case, that any opinion rendered shall make it clear that the right of individual freight absorption is effectively preserved.**

Respectfully submitted,

CAHILL, GORDON, ZACHRY & REINDEL

By THURLOW M. GORDON,
A member of the firm,

63 Wall St., New York, N. Y.
Attorneys for
General Electric Company.

RAY H. LUEBBE,
NEIL C. HEAD,
ROBERT M. BOZEMAN,
Of Counsel.

October 9, 1947.